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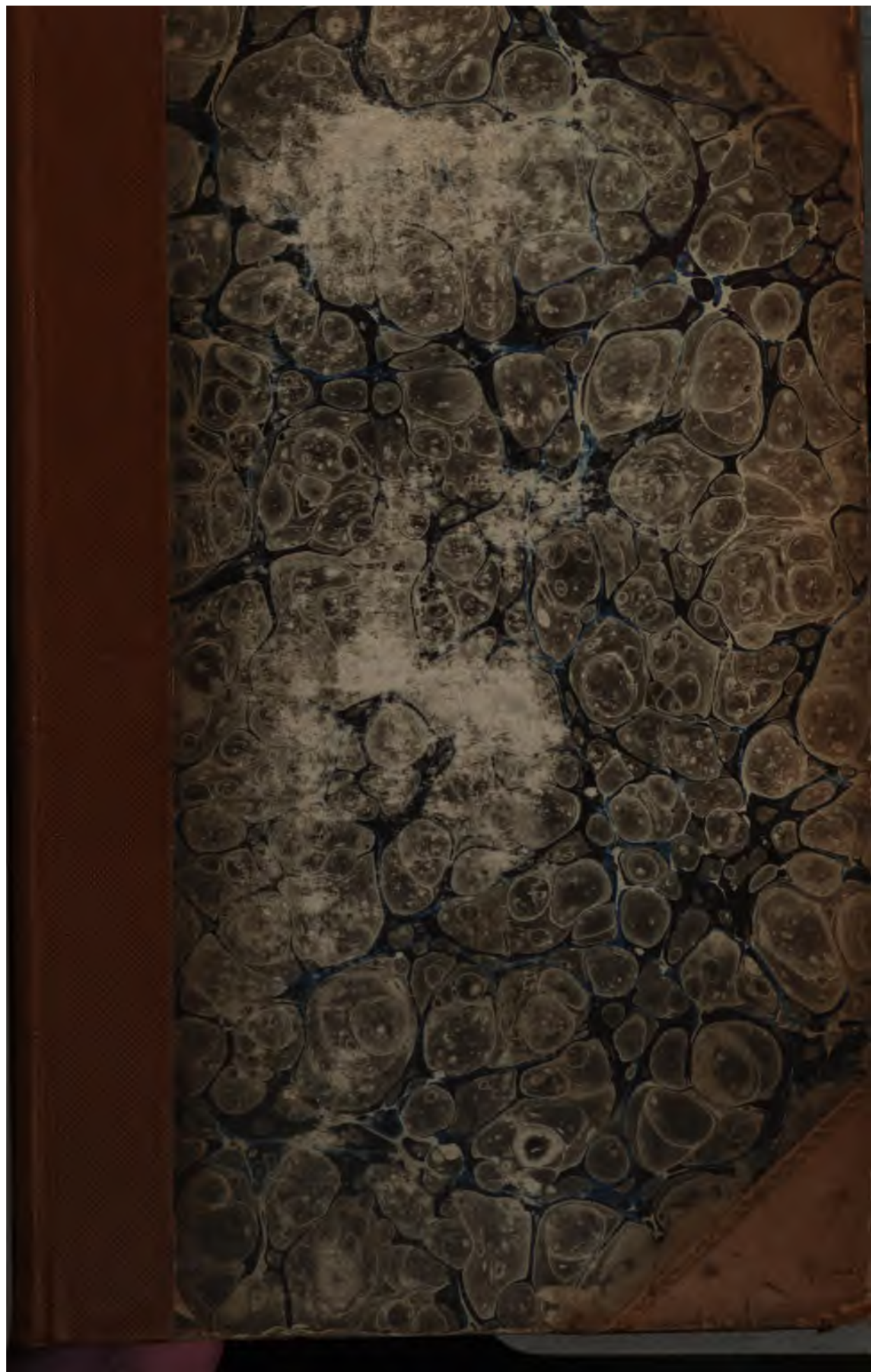
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R E P O R T S
OF
CASES
ARGUED AND DETERMINED
IN THE
High Court of Chancery,

FROM THE YEAR 1789 TO 1817.

29 to 57 GEO. III.

BY FRANCIS VESEY, JUNIOR, ESQ.
OF LINCOLN'S INN, BARRISTER AT LAW.

VOL. XV.

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1827.



N. B. "Versus" always follows the Name of the Plaintiff.

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Lord ELDON,

Lord Chancellor.

Sir WILLIAM GRANT,

Master of the Rolls.

Sir VICARY GIBBS,

Attorney General.

Sir THOMAS PLUMER,

Solicitor General.

CASES

IN

CHANCERY, &c.

48 GEO. III. 1808.

ANONYMOUS.

1808.

April 14th.

AN application was made, without a Petition, on the part of a Bankrupt; who was taken in execution in the county of *Middlesex*. It was stated, that a petition had been presented by the bankrupt; praying, that a day may be appointed for him to surrender under his Commission; which was in the country; and the time had elapsed; that he had been at *Barbadoes*; for the purpose of arranging some affairs for the benefit of his creditors; and the instant he heard of the Commission he returned; but arrived too late. An Order was made upon that petition, that the Commissioners should be at liberty to appoint a meeting, and to take the surrender; since which the bankrupt was taken in execution.

As to the jurisdiction to discharge a Bankrupt, taken in execution after the time for his surrender had expired, having obtained an Order for a meeting to take his surrender, *quere*.

The Order of Discharge, if

The made, must be upon the

Plaintiff at law, not the Gaoler.

Effect of the *Lord Chancellor's* Order, after expiration of the time for surrender of a Bankrupt: authorizing, not compelling, the Commissioners to take the examination; and shewing the *Chancellor's* opinion, that it is not fit that he should be criminally prosecuted.

Vol. XV.

A

1808.

The Lord Chancellor.

ANONYMOUS.

This is a new case. I doubt my authority to discharge this bankrupt. If a bankrupt does not surrender within the time, my Order has no other effect than as an authority to the Commissioners to take the examination; and as a sort of record, that the *Lord Chancellor* does not think it fit, that the bankrupt should be capitally prosecuted (1): but, if he is not coming to surrender according to Law, I do not apprehend, that he is within the jurisdiction to order his discharge.

Mr. *Hart*, in support of the application, mentioned the effect of the circumstance, that he could not possibly surrender.

The Lord Chancellor.

Even after my Order made the Commissioners are not bound to let him surrender. A Petition may be presented; and the Plaintiff in the Action must be served. If I make any Order, it must be upon him; not upon the Gaoler: otherwise, if I should happen to be mistaken, he would be obliged to pay the debt.

(1) Post, 119. Ante, *Ex* VI, 445. *Ex parte Johnson*, *parte Grey*, Vol. I, 195; and XIV, 36. the note. *Ex parte Ricketts*,

1808.

WHITE v. GREATHEAD.

April 27th.

Security for
Costs by a
Plaintiff, gone
abroad, re-
fused after

A MOTION was made, after answer, that the Plaintiff should give security for the costs; having gone to the *West Indies*. Against the Motion an affidavit of his Solicitor

Answer on affidavit of his intention to return; and his family remaining in this Country.

Solicitor was produced; stating, that he had gone to the *West Indies* last *July*, for the purpose of arranging his affairs; informing the deponent, that he intended soon to return to this country; where he left his family.

1808.
~
WHITE
v.
GREATHEAD.

Mr. *Cooper*, in support of the Motion, said, that against the positive affidavit, that he was gone abroad to reside, there was only an affidavit, that he means to return at some indefinite period.

Mr. *Hart*, for the Plaintiff, upon that affidavit, resisted the Motion.

The Lord CHANCELLOR.

The question is, whether the Plaintiff has returned to his former residence, or retains his residence in this country; and the proof is upon the Plaintiff, that he is not gone abroad to reside. His family being here, a temporary residence in the *West Indies* would not make him a resident there. The Solicitor, who makes this affidavit, derives his belief of the Plaintiff's intention to return from his information, and the fact, that he has left his family in this country; and the Defendant, having put in his answer, intimates his opinion, that the Plaintiff was residing here. Under these circumstances it is incumbent on the Defendant to prove clearly, that the Plaintiff has resumed his former residence. Unless he was here, there could not be a stronger affidavit than this.

The Motion was refused (2).

(2) *Ante*, *Weeks v. Cole*, Vol. XIV, 518, and the note.

1808.

HAY, *Ex parte*.*April 28th.*

In Bankruptcy a creditor by a joint and several bond must elect, whether he will go against the joint or separate estate; but was not bound by taking a joint security.

THIS Petition, by joint creditors of *Thomas, Hunter,* and *Latham*, stated, that in the year 1800 they were jointly concerned in an adventure to the *East Indies*. Upon the 7th of *June*, 1803, a Commission of Bankruptcy issued against *Latham*: on the 20th of *June* a Commission issued against *Thomas*; and under that Commission distinct accounts were directed. *William* and *Richard Crawshay* were admitted creditors upon the separate estate of *Thomas* for the sum of 1266*l.* 5*s.* 11*d.* upon the joint and several bond of *Thomas, Hunter,* and *Latham*, dated the 12th of *April*, 1800. On the 3d of *August*, 1802, *Latham* drew a bill of exchange upon *Lake* and *List* for 600*l.* 5*s.* 8*d.*; payable to the Order of *Thomas, Hunter,* and Co. two months after date; which was indorsed by them to the *Crawshays* in part-satisfaction of their debt; and another bill was drawn for 588*l.* 6*s.* 1*d.* payable to the order of the *Crawshays*. Those bills were accepted; but not paid; and on the 25th of *October*, 1802, a Commission of Bankruptcy issued against *Lake*; under which Commission the *Crawshays* proved; and dividends were received from the joint estate of *Lake* and *List*.

The prayer of the Petition was, that the *Crawshays* may be declared to have made their election to come in as creditors against the joint estate of *Thomas* and Co.; and that their proof against the separate estate of *Thomas* may be expunged: or, if they can sustain any proof against the separate estate, that they may be ordered to assign to his assignees for the benefit of his separate creditors,
if

if any (3), and of the joint creditors, all future dividends upon the bills of exchange.

1808.

HAY,

Ex parte.

Sir *Samuel Romilly*, and Mr. *Cooke*, for the Petitioners: and Mr. *William Agar*, for the Assignees.

A creditor by a joint and several bond has not a right to consider himself for different purposes as a creditor against both the joint and separate estates. Having once made an election to go against the one, he cannot resort to the other: the *Crawshays* accordingly, considering their debt as a joint debt, received these bills, a joint security; and were therefore improperly admitted creditors against the separate estate.

Mr. *Hart*, for the *Crawshays*.

The Lord CHANCELLOR said, that, though they took this security, they were entitled to elect, whether they would go upon the joint or several fund; and the Order was made accordingly (4).

(3) In the petition, *Ex* except that to the *Craw-*
parte Ackerman, ante, Vol. *shays*.

XIV, 604, it appears, that (4) *Ex parte Bevan*, ante,
there was no separate debt Vol. X, 107, and the note,
108.

1808.

DONOVAN, *Ex parte*.

April 28th.

Whether a Bankrupt, or any person in the same circumstances, can impeach the Commission upon a prior act of bankruptcy and a debt sufficient to support a Commission, of which a third person may avail himself as a defence to an Action by the Assignees, *quære*.

A Petition to revive an Order for trying the validity of a Commission in an Issue, upon that objection, which had not been prosecuted, and was discharged in 1803, dismissed with costs.

THE object of this Petition was to revive an Order, directing an issue, to try the validity of a Commission of Bankruptcy against *Robert Kennett*. That Order, not being prosecuted, was discharged in 1803.

The Petition was presented by the assignee of *Kennett* under an act of insolvency and other persons; creditors, whose debts were contracted subsequent to the bankruptcy. The objection, upon which the Commission was impeached, was an act of bankruptcy committed in 1796, prior to the debt, upon which the Commission was taken out; and a debt, existing at that time, sufficient to support a Commission.

Mr. *Hart*, Mr. *Bell*, and Mr. *Wetherell*, in support of the Petition; Sir *Samuel Romilly*, for the Assignee under the Commission.

The Lord CHANCELLOR.

This is a most important Petition; with reference to the late decision of the Court of King's Bench, in the case of *Donovan v. Duff* (5). It is clear in bankruptcy, that if a debtor to the estate is sued by the assignees, it is not sufficient to set up a preceding act of bankruptcy, without proving also a sufficient debt, upon which a Commission could have been sued out. It is surprising, that the necessity of proof stopped there; as the proof of those two circumstances does not ascertain, that a Commission ever will be taken out by that creditor; and I believe there are instances of antecedent acts of bankruptcy

CASES IN CHANCERY

7

ruptcy committed, and debts contracted, for the very purpose of defeating a subsequent Commission; most honestly taken out. The Law is however so established; that a debtor to the bankrupt may dispute with the Assignees upon the ground of a prior act of bankruptcy, and a petitioning creditor's debt; though a Commission may never be taken out.

1808.

DONOVAN;
Ex parte.

It is now decided by this case of *Donovan v. Duff*, that the bankrupt himself, (this Petitioner *Donovan* being there treated as the bankrupt), cannot meet his Commission in a civil action at Law by asserting, that he had committed an antecedent act of bankruptcy; and did at that time owe a debt sufficient to support a Commission. It would have been satisfactory, if the report of that case had contained a more enlarged view of the grounds of that judgment; for it goes not only to the action for money had and received, but also to the case, where the *Lord Chancellor* directs a bankrupt, applying by Petition to supersede his Commission, to bring an action. Is that course never to be taken again; where an application is made to supersede a Commission upon this ground? That decision, if right, requires me to dismiss any petition, presented by a bankrupt upon such a principle.

There is, however, a much more important view, in which this must be considered. Is it clear, that a bankrupt, indicted for concealing his effects, cannot set up this defence; that it is not competent to him to insist, that the Commission, under which he stands indicted for a capital offence, is an absolute nullity? In *Bullock's Case* (6) * Mr. Justice *Heath*, Mr. Justice *Le Blanc*, and another Judge, did permit that defence to be made: that is, they permitted

[* 8]

(6) *The King v. Bullock: Ex parte Bullock*, 1 Taunt. 71. Ante, Vol. XIV, 452.

1808.
 ~~~~~  
 DONOVAN,  
*Ex parte.*

permitted an antecedent act of bankruptcy to be proved ; which was considered insufficient ; as there was a failure to establish the fact, that there was also an antecedent debt, sufficient to support a Commission : an unnecessary failure ; as I am informed : the very witness, then in the box, being himself a creditor, having such a debt : but those Judges, of great name certainly, were not at that time apprised, that the Law was, as it appears now to be.

If however the Law is, that it is incompetent to the bankrupt, or any person in his circumstances, to set up this objection, if therefore this petitioner upon the principle, on which his petition is presented, as he stands under the same circumstances as the bankrupt, could not maintain an action, it follows, that, being a legal objection upon a trial, it must be a legal objection here ; and must be a bar to a suit in Equity. If therefore *Donovan* could not have the benefit of that objection to the Commission at Law, his petition could not possibly succeed : nor a bill in Equity, filed by him.

Another view of this case is also important ; but would not authorize me to impose upon the assignee under this Commission all the difficulties, that would follow the Order, which is now desired, until I know the circumstances, independent of the date, upon which it is proposed to cut down the antecedent securities. I allude to the right of the bankrupt to complain of want of diligence in his assignees, as trustees for him as to the surplus ; and to compel them, either by a suit in Equity, or in bankruptcy, to get in all, that they could, for his benefit : but in that way the party, filing a bill, must shew, that the assignees could have got in the effects. There are only two modes : first, to shew, that the securities, \* which he intends to cut down, are of a date subsequent to an act of bankruptcy, and a debt sufficient to support a Com-

a Commission; which, if the case in the Court of King's Bench is law, he cannot do: or, secondly, to prove, that the securities are such in their nature or circumstances, that, let the date be what it may, this Court would not permit them to stand; but would consider the property as capable of being brought into the mass, which the assignees would take into their hands, liable to distribution. There is upon that considerable difficulty. I know nothing of the circumstances, under which the securities were obtained; and, with regard to the principle, a petition, stating all the circumstances, and praying relief by an original order upon the circumstances, so represented, would have been much more likely to be effectual than this petition; calling upon me to go vastly beyond the attempt in the Court of King's Bench: viz. in the year 1808 to revive an order at the instance of persons, claiming under the bankrupt; which order had been discharged in 1803; as not duly prosecuted. Is it possible now to put the assignee under all the additional peril and difficulty from the lapse of time since? They may present such a petition as I have mentioned: but I will make no other order upon this petition than that it shall be dismissed.

1808.  
DONOVAN,  
*Ex parte.*

---

The Petition was dismissed with costs.

1807.

Nov. 10th, 20th.

1808.

Feb. 12th.

March 5th,

21st.

## WATERS v. TAYLOR.

Although an agreement to refer disputes to arbitration is, generally, no objection to a suit in a Court of Equity, yet upon the nature of the subject, the management of the Opera House, and the anxious provision of the parties for arbitration, the Court refused upon motion to interfere, before they had taken that course.

The principle, upon which a Court of Equity

interferes between partners by appointing a Manager, Receiver, &c. is merely with a view to the relief, by winding up and disposing of the concern, and dividing the produce: not to carry it on. The Court therefore would not upon motion appoint a Manager, &c. of the Opera House, except upon the principle, applicable to any other partnership, as necessary to the relief, a foreclosure; taking into consideration also the difficulties from the nature of the subject and the contract, an anxious provision for arbitration, and, that one party was by the express contract Manager.

**T**HE Plaintiff in this cause claimed, as executor of Mr. *Gould*; who was entitled by assignment from the Defendant Mr. *Taylor*, in 1803, to seven sixteenth parts of the *Italian Opera House*; and as mortgagee of the remaining shares; which continued to be the property of *Taylor*. The bill prayed a foreclosure of the mortgage, a specific performance of an agreement, and farther relief, upon deeds, executed in the years 1792, 1803, and 1804; and a motion was made by the Plaintiff, that the Defendant *Taylor* may be removed from the management; and restrained from interfering, and receiving the profits; that a proper person may be appointed manager, with the same powers as *Gould* and *Taylor* had, or such other powers as the Court shall think fit; that a receiver may be appointed; and that proper directions may be given for payment of the money: the Plaintiff in support of his application alleging, that the Defendant had in several instances neglected his duty as manager; that he did not, and, from the embarrassed state of his affairs, could not, attend in person; and was never at the theatre, except on *Sunday*: stating various breaches of covenant and instances of mismanagement; that he had not sent the money received to the banker's; that he had engaged

engaged performers and other persons, without consent, contrary to the deed; that he discharged the treasurer, and a person, who acted as deputy manager, without a salary; engaging another as ballet-master, and also as deputy manager at a salary of 1200*l. per annum*; that he engaged one performer at a salary of 5000 guineas for the season; 3000 being sufficient; with liberty to her to sing at other places; permitting the ballet-master also to act in the same capacity at the Theatre in *Drury Lane*.

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\*The Defendant denied the charges of mismanagement; justified his conduct in the particular instances, pointed out by the Plaintiff; referred his absence to threats of personal violence and of an arrest by the Plaintiff; stated, that no loss had been incurred by his absence; that he had been manager for twenty-five years; and had reduced the debts of the concern from a very large amount to 23,000*l.*; and represented, that the management had always been carried on by deputy; and it was better it should be so on account of unreasonable demands by the performers upon the principal; with which the deputy could not be expected to comply.

The general title, embracing all the interests in the theatre, stood upon the deed of 1792. The interests of the parties to this cause were regulated by the subsequent deeds of 1803 and 1804. The general effect of the deed of 1803 was, that *Gould* was to have the sole, exclusive, and entire, management and conduct of the theatre, during the joint lives of himself and *Taylor*, as long as *Gould* shall think fit; subject to certain restrictions; the sole privilege of selling the boxes, contracting with performers, &c.; and, generally, to do all such other acts, &c. as fully and effectually as *Taylor* before that period had been accustomed to do, &c.; that *Gould*  
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from that period should act as sole proprietor; as *Taylor* had previously acted; that he should give his personal attendance: if either should sell his interest, or go abroad, the management to devolve upon the other; if *Gould* should decline the management, it was to be in them jointly, or in such person as they should appoint: after the death of both it was to go according to the appointment of their executors, respectively; and in the event of the death of *Gould*, *Taylor* was to become the manager. Among various provisions with reference to the management it was declared, that no more than the sum of 500*l.* should be expended in the preparation of any one Opera, and that no engagement with a performer should be finally concluded, and no banker, treasurer, receiver, or servant, should be removed without the consent of the other part-owner; and, that in case the part-owners shall not agree upon a person to fill any such office or station, that shall be considered a matter in difference for arbitration; each party to name one arbitrator; and if either shall refuse to name a person for ten days, then the person, nominated by the other as arbitrator, shall decide. Besides several special provisions for arbitration, if they should not agree upon the price of the boxes, and in various other instances of probable dispute, there was a general clause, that, if any doubt, question, difference, or dispute, shall at any time arise between the parties or their executors, touching the construction of these presents, any clause, &c. or any account to be settled, or the measures to be taken in any event, not expressly provided for, or in any other manner whatsoever touching the management or conduct of the said theatre or the appointment or the duty of the manager or any other person employed, and such doubt, &c. cannot be settled among themselves, it shall be determined by arbitration; with the usual provision, that the arbitrators should choose an umpire, order attendance, take evidence on both sides; and use

use all other ways and means to enable them to decide upon the matter in question; as they should think fit; and that the award should be binding and conclusive; and be observed and kept by them accordingly, without any suit whatsoever; and should be made a rule of the Court of King's Bench.

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Sir *Arthur Piggott*, Mr. *Fonblanque*, Mr. *Hart*, and Mr. *Johnson*, in support of the Motion: Mr. *Richards*, Mr. *Samuel Romilly*, Mr. *Leach*, and Mr. *Wetherell*, opposed it.


The Lord CHANCELLOR suggested the absolute necessity, that these parties should go to arbitration; and also took the objection, that this Court does not interfere for the management of a joint concern, except as incidental to the object of the suit, to wind up the concern, and divide the produce (7): the only question is, what the Court will do in the interval; until the foreclosure, sought by this bill, can be obtained: but the Court will not appoint a manager under such a covenant as this.

For the Plaintiff it was observed, that an agreement to refer disputes does not oust the jurisdiction of a Court of equity: the case of *Halfhide v. Fenning* (8), in which Lord *Kenyon* over-rules Lord *Hardwicke's* decision in *Wellington v. M'Intosh* (9), having been frequently impeached, and even by Lord *Kenyon* himself. It was insisted, that the relief sought, by appointing a Receiver, was given in every case of a partnership, where one partner is wasting the property, or illegally charging the other; and that the difficulties, presented to the Court by this case, are not

(7) *Forman v. Homfray*, VI, 815. *Mitchell v. Harris*, 2 Ves. & Bea. 329. See *Harrison v. Armitage*, 4 Madd. 143. Ante, Vol. XIV, 270. *Gourlay v. The Duke of Somerset*, II, 129. 4 Bro. C. C. 311.

(8) 2 Bro. C. C. 336. See ante, *Street v. Rigby*, Vol. post, XIX, 429.

(9) 2 Atk. 509.

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not insuperable; nor greater than occurred in the case of *Drury Lane Theatre* (10).

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Taking the general doctrine now to be according to Lord *Hardwicke's* opinion, which goes upon the principle, that this Court has powers of inquiry beyond those of an arbitrator, do any of those cases go the length of such a special, anxious, provision for arbitration as this; applying to every case, in which a difference could arise; and stipulating expressly, not only that the arbitrators shall determine upon evidence, but that they shall be at liberty to use all other ways and means to enable them to decide, that they shall think fit: the parties evidently anxious to exclude this jurisdiction upon a subject, to which certainly it is very inadequate?

An interest in a theatre must undoubtedly be protected; as property of any other description; and a Judge cannot look at the difficulties, belonging to the situation and nature of the subject, with effect; as forming an objection to the jurisdiction (11). It is his duty to meet and overcome them, if he can; and greater difficulties never occurred than in the case of *Drury Lane Theatre* (12). On the other hand, however, this species of property must be treated as all other property in a Court of Justice: the interest of all concerned must be attended to; and

(10) Against an objection and they were bound to for want of parties, the case of those, with whom they had of *Cullen v. The Duke of* contracted.

Queensberry was cited; where (11) See ante, *Turner v. Morgan*, Vol. VIII, 143, the case of Partition of a house. *Adley v. The Whitstable Company*, post, Vol. XVII, 315.

(12) *Ex parte Ford*, ante, Vol. VII, 617.

and it is wholesome to apply to this species of property, equally with others, the ordinary rules; as, that the same parties shall be required in this case, as in another; that the presence of parties shall not be dispensed with; that the same regularity or proceeding shall take place as in other causes. No difficulty of that sort occurs in this instance.

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This is compared to the familiar case of a partnership. There is no instance of an application for the purpose of putting a manager or receiver upon partnership property, where the Court did not pause from regard to the interest of the parties; putting it to them to consider, whether they would by a proper attention to their own interests remove the necessity of doing that, which, though it must be done, when necessary, is at the best a ruinous proceeding. If that is the usual practice upon partnerships in *London*, where the parties have not provided, that no such measure shall be adopted, without entering into the consideration, how far these parties have conclusively provided another remedy, such an intimation from the Court is peculiarly wholesome, if the parties have upon the face of the instrument demonstrated their conviction, that a Court of Justice should not be hastily resorted to: especially, if the nature of the subject is such, that a Judge, feeling himself bound to determine, must acknowledge, that he cannot understand it; and the instruments, which must decide upon the rights of the parties betray their consciousness, that no Judge could understand it.

This is to be distinguished from every other case upon an application for a receiver or manager in this respect. These parties having by express contract mutually stipulated with respect to the management, this is an application by interlocutory motion, that the Court shall decide whether a person, who by the contract is receiver and manager,

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manager, shall have the benefit of the contract ; if he has by his conduct forfeited the right to continue in that situation. This is not therefore the ordinary case of a partnership in trade ; where, all the partners having an equal right to be in the management, as far as partners have that right, and no one having the exclusive right, the Court is obliged for the protection of them all to say, than none of them shall have the management. These parties have not told the Court, what are the circumstances, under which they have stipulated that the one or the other of them shall be displaced : nor, what are the duties of the manager : but they are described by reference to what has been done in past times ; of which transactions I have no account. In this case the objection for want of parties cannot be raised ; for this contract, unless the rights of others are interposed, must govern these two parties.

After these general observations I proceed to make some comments upon this deed of 1803. In every part of the instrument the most anxious care is manifested, that, where any difference of opinion should arise, recourse should be had to arbitration ; and, whatever may be the law upon a clause of that nature, when relief is sought by interlocutory motion, which is in effect the relief to be given at the hearing, the Court should see, what was the intention of the parties ; and will not hastily interfere in such a case. With regard to the stipulations as to the management, and, generally, to do all such other acts, matters, and things, in and about the theatre, and the conduct and management of the entertainments, as fully and effectually as *Taylor* had been accustomed to do, hold and enjoy, or might have done, &c. if he had continued the sole proprietor ; which must determine the question, how far personal attendance, or opportunity of individual resort, is to be had, and as to the covenant by *Gould* to

to take upon him the management, as long as he shall think it expedient, and to exert his skill, &c. for the benefit of himself and *Taylor*, in proportion to their respective interests, the Court, I agree, must have met the difficulty upon a question, whether the covenant was performed. The effect is, that by express contract during their joint lives *Gould* was to have the management, as long as he thought proper: but, if he did not think proper to continue in the management; then they were jointly to appoint a manager: and the case of their disagreement is provided for; and after the death of both the management is to be according to the appointment of their executors, respectively: but upon the death of *Gould*, the event, that has happened, the management by the express contract of *Gould* himself devolves upon *Taylor* as fully and beneficially to all intents and purposes as *Gould* himself had it: that is, as fully and beneficially as *Taylor* had before been accustomed to hold it. Upon the clauses, restraining *Gould*, or any other manager, from concluding engagements with performers, from expending more than 500*l.* upon any Opera, and from removing any banker, treasurer, or even door-keeper, or servant, without the consent of the other part-owner for the time being, the conclusion is, that it was in the contemplation of both parties, that controversies upon each of these subjects, considerably affecting their interests, might arise: the case being pre-supposed, that one party might attempt the appointment of persons, from the banker to the door-keeper, without the consent of the other.

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The argument with reference to these provisions is, that the Court can no more renounce the jurisdiction on account of the ridiculous or frivolous nature of the dispute, than upon the most important point: but my argument is, that the forum they have provided for them-

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selves,

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selves, and the guard, introduced by them against the forum of the country, (whether effectually I do not say) shews their intention against the interference of any other jurisdiction, until they have tried the effect of the special means, provided by themselves; and that course, which is familiar in the common case of partnership, is more especially to be adopted, where the parties have themselves expressed that intention. The case may be supposed, that an Opera was prepared for representation; which might be demonstrated to be so likely to attract the public attention, that it was expedient to lay out 50*l*. more than the sum of 500*l*., fixed by the restraining stipulation; and that it was necessary, that it should be got up in the course of a month: is that dispute about 50*l*., or a difference upon the appointment of a servant, to be decided by a reference to the Master upon an interlocutory motion; though the parties have provided the remedy by arbitration as to every point upon it was probable, that a difference of opinion might arise: anxiously endeavouring to secure themselves against applications of this nature?

With reference to the case of *Halfhide v. Fenning* (13) I admit, that upon the best authority the opinion, expressed by Lord *Kenyon* in that case, is wrong; as there are against it the concurrent opinions of Lord *Hardwicke*, Lord *Thurlow*, Lord *Rosslyn*, and of Lord *Kenyon* himself. As a general proposition therefore, it is true, that an agreement to refer disputes to arbitration will not bind the parties even to submit to arbitration, before they come into Court. I would not therefore say, that the consequence of this provision in the instrument is, that a suit cannot be instituted, without adding this qualification; that the Court, if bound to administer relief,

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(13) 2 *Bro. C. C.* 336. See 4 *Bro. C. C.* 311. *Gowlay v. ante, Street v. Rigby*, Vol. *The Duke of Somerset*, post, VI, 815. *Mitchell v. Harris*, XIX, 429. II, 129, and the note, 137.

is fully justified in pausing, before it takes upon an interlocutory motion a step, that is in truth the greatest part of the relief: and if the Court will not come to such a decision in the cases, to which I have alluded, where no individual has any particular right, founded in contract, which is to be divested, it is much more wholesome; where the parties have contracted for this mode of settling their differences, and the point of dispute is one; which is expressly provided for, to let them try, whether they cannot so settle it; than that this Court should interpose upon this sort of summary application.

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If, however, though the very subject in dispute is expressly stated as a subject for arbitration, the Plaintiff does not think proper to leave to that species of decision the question, for instance, whether *Taylor* does execute the duties of manager, the farther consideration is, whether, supposing the deed contained no such clause, the Court is not desired to do upon the principle, that *Taylor* is unable to execute his duty, much more than is ordinarily asked upon a summary application. In this instance all the parties have not an equal right to the management: this is not the ordinary case of a partnership; where each partner has as much right to interfere as any other: but here one individual is by express contract placed in the situation of manager. The object of this interlocutory motion is therefore in the nature of judicial relief against the effect of the express contract; and the Court ought therefore to be perfectly sure, that the conduct of the Defendant has been such as to make it proper, from regard to the interests of others, as well as himself, that he should be removed from that situation, in which the contract placed him. He may insist, that he cannot be displaced, unless the Court is prepared to decide, that he is not entitled to the benefit of the contract; as he is not; if he cannot perform the duty; or if he acts against

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it. I will not undertake to say, whether a deputy manager might not be appointed: but I have no doubt, that even in that case the personal exertions of the manager himself are due to the concern; and it is very difficult to make out, that his personal attendance may not be sometimes necessary: in what degree I cannot upon the information before me determine. The fact, however, that his personal attendance cannot be had, is not the only material fact; as for the same reason he cannot be personally resorted to in the degree, which the management requires.

In that view of the case therefore I could only refer it to the Master to inquire, whether he is in a situation, in which he is capable of performing the duties of manager: but I am so strongly pressed by the consideration, that, whatever view the parties themselves may take of the subject, they are calling down upon them an interposition, perhaps not the most ruinous, but that cannot take place without infinite mischief to all, who may have any interest in the subject, that I shall give them an opportunity to pause; and consider, whether they will press for my determination, or have their disputes determined by that more wholesome mode, which they have themselves provided; and I recollect very few instances, where this sort of recommendation has been given in vain.

The parties afterwards went to arbitration; and an award was made; deciding, among other points, that the performers had been engaged without the consent, required by the deed; and in the particular instance at an improper salary under the circumstances of the Theatre; that the personal attendance of *Taylor* was required by the deed; that he could not delegate the functions of
 manager;

manager; but that no loss or injury from his non-attendance was shewn.


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The application to the Court was afterwards renewed; with the consent of the trustees, by a Motion to remove *Taylor* from the management; to restrain him from receiving the profits; to appoint another manager; to restore the treasurer, whom he had removed; and that the money received should be paid into a bank.

The Lord CHANCELLOR.

Upon this Motion the question, whether a manager is *March 5th.* to be appointed by this Court, to be invested with the same powers, that *Gould* and *Taylor* had, depends upon the point, whether, according to the contract, regulating the powers of a manager, this Court can give such powers. The Court cannot go beyond the contract of the parties, or a due application of the general principles of equity in cases, to which the express contract does not apply. The application is also, in the alternative, that the Court may give the manager such other powers as the Master may give; and that a Receiver may be appointed; with proper directions for payment of the profits. What are the directions, which the Court is to give for that purpose, is not in any degree explained; and must depend upon the rights, interests, covenants, and contracts, of all persons, who have any interests whatsoever in the Opera House; and who can under those covenants and contracts call upon the person, receiving the profits, to dispose of them according to the contract: the trustees, who are Defendants, representing, not only all the great variety of persons, interested, but also the representatives of *Gould* and the Defendant *Taylor*, as entitled to the residue.

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In the case of *Drury Lane* (14) I had great difficulty in making the arrangement; and upon this occasion I cannot learn otherwise than from these voluminous deeds, what would be the proper directions for the management of such a concern: so unwieldy, that the Court does not well know how to deal with it. There are but two modes: first, considering it as a concern in property, to be regulated according to the course, that prevails in other causes, between suitors in general; and upon that principle I could do no more than refer it to the Master to look into all the deeds; and state upon the whole, in what manner, and for whose benefit, the profits received ought to be applied. I mark this circumstance; as a serious difficulty, occurring in the outset of this application, and pointed out by the ordinary practice; as in the usual case the Court is never expected itself to look through the title-deeds; and arrange the interests and claims with a view to the proper application of the rents and profits.

One object of this Motion is an Injunction to restrain the Defendant *Taylor* from interfering, and obstructing *Jewell* in acting as treasurer, and from receiving any money at the doors otherwise than by the hands of that person. The obvious consequence, if this Motion succeeds, is, that there will be no manager, until one shall be appointed, and approved. The difficulty upon that is, that the treasurer, receiving the money each night at the doors would be under considerable difficulty to know, what he was to do with it, upon all these instruments, until the Court can tell him, what is to be done with it. If, for instance, no performer can be engaged but by the joint consent of these parties, could he venture to pay any performer? These instances shew the infinite difficulty, that must occur in the management of the business here.

Whatever

(14) *Ex parte Ford*, ante, the note, Vol. I, 130, *Ex* Vol. VII, 617. See the other *parte O'Reily*.
 theatrical cases referred to in

Whatever may be the law of this Court as to the capacity of parties by stipulation to deprive themselves of the right to resort to a Court of Justice in the first instance, and taking the law to be, that a man cannot bind himself to forbear to come here, until an arbitration has been had (15), in almost every line of this deed of 1803, upon which the suit is instituted, the parties have expressed the greatest anxiety to keep out of Court; if they could in any manner arrange their disputes by arbitration. Accordingly I thought it within the scope of my discretion to give the recommendation, that has been given in every case, where it was proposed to make this Court the manager of any joint concern: giving the parties an opportunity of preserving themselves from the ruin, that must be the necessary consequence of an active interference of the Court. That led to the arbitration; the award stating, that the personal attendance of *Taylor* was required by the deed; and that no loss or injury from his non-attendance hitherto had been made out. I agree with the arbitrators, that his personal attendance is required; and I think, this Court is not entrusted with the right even to discuss, whether his non-attendance had or had not occasioned any loss: both parties having stipulated for his attendance; and in many cases a loss, which cannot be shewn, may follow his non-attendance. The arbitrators, however, have not certified their opinion, that he should cease to be the manager; or, whether, if his future attendance is required, as I think it is, he can give it; and, if not, whether another manager should be appointed: nor am I by this award furnished with any means of knowing, what another manager, if appointed, is to do. I can collect that only from the instrument.

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(15) *Mitchell v. Harris*, note, 137. 4 Bro. C. C. 311. ante, Vol. II, 129, and the *Street v. Rigby*, VI, 815.

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With reference to the other points of the award, stating, that *Taylor* cannot delegate the functions of manager without consent of the Plaintiff, that the person, appointed stage manager, was not fit to be employed in that capacity, that *Taylor* has no power, as manager, finally to conclude, or to make, any engagement with any performer without the Plaintiff's previous consent in writing, or to discharge the treasurer, or other officers, without his consent, the questions are very different, whether *Taylor* could employ any other person to assist him; and whether that person is to be paid out of the trust fund. I can give no directions for payment of the money but such as the Master shall upon all the deeds consider the proper expenditure under the covenants; and, giving such directions, I must order the person, who receives the money, to keep it, until the Report is made; who therefore can make no disbursement except upon his own view, and at his personal hazard. What is to be the rule for the application of the funds, if it is not to be found in the deeds? Is the Master, or is the Court, to select the performers, to be engaged; and to say, what are excessive and unprecedented salaries? I do not deny; that the Court may, if the parties insist upon it, be forced to decide, from what part of *Europe* performers are to be brought, and at what salaries; and it would not be unlikely, that it might have to determine in 1809, what performers should be employed, and what salaries allowed, in 1808: yet it is not in the power of this Court to decline to act, on the ground, that the contract is absurd; and gives such clashing powers, that the consequence of acting must be the ruin of the parties. If the parties choose to abide by the contract, a Court of Justice must execute it: let the consequence be what it may.

The parties to this deed of 1803, unless they meant, that arbitration should determine all differences, that  
 might

might arise, could not have formed an instrument, more directly insuring the destruction of the concern by the interference of this Court. They might not agree as to the course of management; or whom they should jointly appoint to be manager. The manager, when appointed by them jointly, can do no one act without their joint consent: nor can he, or any person employed, be without their consent turned out. Upon this deed, if it stood alone, the question would be, what a Court of Equity is to do with it. It is compared to the cases of partnerships; *West India* estates, and other cases, in which this Court puts in a middle man; and a notion seems to be conceived, that this Court is to be employed in carrying on any concern. In the instance of a partnership, if the partners cannot agree, each excluding the other, that state of circumstances, operating as a dissolution, puts an end to the partnership; and this Court then interposes in this way; that it will wind up the concern; and with that view will appoint a person to collect and manage, until an end can actually be put to the concern (16). So, a manager of a *West India* estate is appointed, not for the purpose of carrying it on, but to enable the Court to give relief, when the cause shall be heard. The same principle, however, upon which a covenant is inserted, that this concern shall proceed for forty-two years, and, if the parties cannot agree, the *Lord Chancellor* is to appoint a manager, will justify an expectation, that this Court is to carry on every brewery, and every speculation in the kingdom. Such a covenant will not induce the Court to act. If the Court should appoint a manager, that would not produce a different effect: the parties might still differ upon the engagement of performers, the appointment of salaries, or other points; and the deed says, the manager shall not engage any performer, and of course the treasurer cannot pay, without consent; and this Court will not permit a Receiver to lay out more than

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(16) 1 *Ves. & Bea.* 158; *Bea.* 329. *Marshall v. Col-*  
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Receiver not  
permitted to  
lay out more  
than a very  
small sum at  
his discretion.

than a very small sum at his own discretion(17). At least an inquiry would be directed, whether a salary of 5000*l.* is a provident application. The same necessity of consent in every appointment, from a banker to a door-keeper, may produce disputes; upon which the same course must be taken.

The clear result is, that upon the footing of this deed, unconnected with the paramount title, the Court cannot manage this concern. The parties, conscious, that they so ill understood their arrangements, and so little foresaw the difficulties, to which they led, that their deed ought not to give the rule, desire the Court to take upon itself the management; giving the person, who shall be appointed manager, not the powers, prescribed by the deed, but such powers as this Court shall think fit. If these two parties only were interested, and representing, that they could not carry on the concern, desired a sale, this Court would, for the purpose of regulation in the intermediate time, with a view to the relief, ultimately to be given, appoint a person to manage: but this application is made upon a deed, under which it is absolutely impossible, that this concern can proceed; desiring, that during these reversionary terms this Court shall be the manager; which may with equal reason be desired in every brewery, and all the joint concerns in the kingdom. Another difficulty is, that, if this deed cannot furnish the means of arrangement, so as to carry on this undertaking for their benefit, it does not follow, that this Court is to interpose upon its own notion of what powers should be exercised for their benefit. In that case the Court must look at the title, as it is, without these stipulations; and then it is an absolute mistake to conceive, that these trustees are trustees only for the annuitants, and persons, having boxes and privileges in this theatre: they are trustees for the residuary interest as much as for the rest.

Upon

(17) See ante, *Fletcher v. Dodd*, Vol. I, 86, and the note.

Upon the whole it is quite impossible that this Court can appoint a manager, with such powers as the Court thinks proper. Suppose the manager appointed: could the Court say, he might incur a greater expenditure than these trust-deeds in general authorize? If a performer required 500*l.* for one night, and the deed said the nightly expence should not exceed a certain sum, it would be impossible to sanction such a payment. The whole therefore, which the Court could do, is to refer it to the Master to look into the general title; to state the charges and incumbrances; what payments are, and what are not, warranted by the instruments; how such payments are to be made; and what expenditure would be reasonable and proper for the benefit and interest of all concerned. I cannot feel my way to comply with any part of this motion except as to the application by the hand, that is actually to receive the money; and for that purpose I cannot do any thing; unless I am informed, how the person, who receives the money, can part with it, consistently with the application of the funds of this property, as provided by these instruments; and what application will be consistent with them. If such an application can be pointed out, I will hear it: otherwise I can do nothing.

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The Motion was renewed, with consent of the trustees. Feb. 21st.

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*The Lord* CHANCELLOR.

This must be considered as a suit for a foreclosure, for directions as to the interim management, and for a specific performance of the covenant in the deed of 1803. With respect to the foreclosure, it is within the province of the Court to appoint a Receiver; if it can do

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do any good; expressly declaring, that the appointment is not to interfere with the rights, interests, and remedies of those, who have claims, paramount both these parties. As to the other objects of this bill, there is no possibility of specifically performing such a covenant as this: the parties having made that consent necessary, which the Court cannot compel them to give. The only relief therefore, that can be given, when the cause shall be heard, is the foreclosure. Then, considering the nature of this property, can this Plaintiff call upon the Court to assume the management of the Theatre in the mean time? See, how usefully the Court would act. The very ground, taken by this bill, supposes, that there is no performer, of whom the Court can take notice; alleging, that all the performers have been engaged contrary to the provisions of the deed. The Court then, for the purpose of executing a foreclosure, finding, that the parties have entered into deeds, that cannot regulate the concern, is in mean time to do what it can with it; taking upon itself to engage all the performers; beginning by shutting up the House; and directing a reference to the Master to inquire, what performers ought to be engaged; upon what terms; and to state the circumstances. That, considering the time, that must elapse in the inquiry, is an application of the principle, calculated for preserving property, to the destruction of it. As to the trustees, no relief is prayed against them: they have not filed a bill; and the case is not aided by having them parties. Suppose, they should file a bill: the questions would then arise, who are to be the banker and treasurer; and how the funds are to be applied; depending upon these deeds of *August 1792*, and *March 1804*. My opinion is, that this Court has no jurisdiction to manage this concern merely for the purpose of carrying it on. The Court will order it to be sold, or foreclosed: will deal with it as property: but no farther. The result is, that this is an  
application

application to the Court by Motion, under a Bill for a foreclosure, to be the Receiver, Treasurer, Contractor with the performers, and others, and the manager, in every sense, of this Theatre. I do not see my way to make such an Order; and, if I did, I must by acting ruin all concerned. They have still the *Locus Pœnitentiæ*; and, if they will not settle their own interests, it is immaterial, whether the consequences shall be produced by their own acts or by mine.

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No Order was pronounced; and the application was not renewed (18).

(18) See the Report of the Hearing, 2 *Ves. & Beq.* 299.

PEARSALL v. SIMPSON.

ROLLS.  
1808.

March 23d.

**ELIZABETH FARNELL** by her Will gave to trustees the sum of 400*l.*; in trust to continue or place trust to pay the same at interest on Government or real security; and the interest to pay the interest and produce to her sister *Mary Stafford* during her natural life, for her separate use; and the separate use of A. for life; and, after her decease, her decease, produce to her sister *Martha Farnell*, during her natural life, as to the capital for her separate use; and after the decease of both sisters in trust to pay and divide the said principal sum or what children: if no shall remain thereof unto and equally amongst all such child, to pay children the interest to her husband during his life; and from and after his decease, in case he shall become entitled to such interest, then to pay the principal to other persons.

Though the husband, having died during his wife's life, never became entitled to the interest, the limitation over was established; as distinguished from the case of express condition.

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 v.
 SIMPSON.

children of *Mary Stafford*, as shall be then living; and, if there shall be but one such child, then in trust to pay the same unto such only child; such principal sum or the shares to be paid to such child or children, when and as soon as he, she, or they, shall respectively attain the age of twenty-one; and the interest in the mean time to be applied for his, her, or their, benefit, as the trustees shall judge best; and, in case there shall be no child of *Mary Stafford*, who shall survive both the testatrix's said sisters, and attain twenty-one, then to pay, &c. the said principal, &c. to and among such children or child of *Martha*, as shall survive both the testatrix's said sisters, &c. in the same manner; and, in case there shall be no child of either of her said sisters, who shall survive them, and attain twenty-one, then in trust from and after the death of both her said sisters and their children if any to pay the interest of the said principal sum or what shall then remain thereof to her brother-in-law *Richard Stafford* during his natural life; and from and after his decease in case he shall become entitled to such interest then in trust to pay and divide one half of the said principal sum or what shall then remain thereof unto and equally amongst all her (the testatrix's) first cousins on her father's side, who shall be then living, and the children of such first cousins as shall be dead: the children to take only their parent's share; as if the parent was living; and the other half unto and equally amongst all her first cousins on her mother's side, who shall be then living, and the children of such first cousins, who shall be dead: the children to take only their parent's share; as if the parent was living. A power was given to the trustees to advance part or the whole principal to the sisters of the testatrix, if reduced in circumstances; to make a comfortable income.

The testatrix then gave another sum of 400*l.* upon
 similar

similar trusts for her sisters and their children; with this difference only, that *Martha Farnell* and her children were to have priority; and, in case there shall be no child of either, &c. then in trust from and after the death of both her said sisters and their children, if any, to pay the interest to the person, who shall happen to be the husband of *Martha* at the time of her decease, during his natural life; and from and after his decease in case he shall become entitled to such interest then in trust to pay and divide the principal in like manner as the first mentioned sum of 400*l.*, subject to the same deduction; in case his sisters, or either of them, shall be in reduced circumstances.

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PEARSELL
v.
SIMPSON.

The testatrix then gave to the same trustees the farther sum of 650*l.*; in trust to pay the interest to her sister *Martha Farnell*, until she shall marry, and in case of any loss in her fortune to make it good; and, in case her said sister *Martha* shall happen to marry, or to depart this life unmarried, then from and after such marriage or death in trust to divide the said sum of 650*l.* or what shall remain thereof into thirteen parts; and of seven of such parts to apply as well the interest as principal in the same manner, as directed touching the first sum of 400*l.*: four other parts, as directed touching the second sum of 400*l.*; and, as to the other two parts, to pay the interest to *Martha* for life for her own use, as aforesaid; and the principal after her death to *Martha Gifford*; and, after some legacies, she gave the residue of her estate and effects, real, personal, and mixt, to *Martha Farnell*, her heirs, executors, &c. and appointed her sole executrix.

The testatrix died in 1775. *Martha Farnell* afterwards married *Peter Eaton*; who died in 1785; and she died on the 10th of *December*, 1791, without leaving issue.

Richard

1806.
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 PEARSALL  
 v.  
 SIMPSON.

*Richard Stafford* died in *October*, 1791; and his widow *Mary Stafford* died in 1807, without leaving issue.

The Plaintiffs were the children of *John Pearsall*, deceased, one of the first cousins of the testatrix on the father's side; claiming, with the Defendant *Mary Simpson*, the only surviving first cousin of the testatrix, one moiety of the several funds of 400*l.*, and 400*l.* and eleven thirteenth parts of the 650*l.*, to be divided in equal moieties between the Plaintiffs and the Defendant *Mary Simpson*; and praying accordingly: the other Defendant, the personal representative of *Martha Eaton*, insisting, that the trusts of the Will concerning the said funds in favour of the first cousins of the testatrix and their children were contingent; and depended upon the events of the husbands of *Martha Eaton* and *Mary Stafford*, respectively, becoming entitled to the interest; and, as neither of them became so entitled, the funds upon the respective deaths of *Martha Eaton* and *Mary Stafford* without issue sunk into the residue.

Mr. *Hart*, and Mr. *Wear*, for the Plaintiffs: Mr. *Roupe*, for the Defendant *Mary Simpson*.

Mr. *Cooke*, and Mr. *Byller*, for the Representative of the Residuary Legatee, contended, that the event, upon which alone the legacies were given over, had not happened: the husbands of *Mary Stafford* and *Martha Eaton* never having become entitled to the interest. They cited *Doo v. Brabant* (19), *Calthorpe v. Gough* (20), *Denn v. Bagshaw* (21), *Holmes v. Cradock* (22); as authorities, that the intention, though apparent, if not sufficiently expressed, cannot be executed.

The Reply was stopped by the Court.

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(19) 3 Bro. C. C. 303.

(22) Ante, Vol. III, 317.

(20) 3 Bro. C. C. 395, n.

*Parsons v. Parsons*, V, 578.

(21) 6 Term Rep. 512.

*The MASTER of the ROLLS.*

The only question is, whether *Richard Stafford's* taking for life was a condition precedent to the cousins of the testatrix taking the capital. That would be a most absurd condition undoubtedly; for there is no sense or reason, making the right of her first cousins depend upon a fact, totally unconnected with any intention as to them. What was it to them, whether *Richard Stafford* took, or not. Such a construction is not to be made; unless absolutely necessary. It is very different from the case, put by Mr. *Cooke*: a case of direct condition; that if *A.* lives to a particular period, he shall take: otherwise he shall not. It was doubtful, whether *Richard Stafford* would live to become entitled to the interest. The testatrix, giving the capital over after his death, recollects, that he may not live to take the interest: but, if he does, she makes his death the period, at which her first cousins are to take. It is, not a condition precedent, but fixing the period, at which the legatees over shall take; if *he* ever takes. The words will bear that construction; and the reason of the thing seems to require it.

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 PEARSALE  
 v.  
 SIMPSON.

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The Decree was made accordingly (23).

(23) See the note, ante, Vol. IV, 718.

1808.

March 12th,

18th, 19th.

Bill to set aside leases, obtained by an Agent and Attorney from his Principal, dismissed as

to voluntary leases; being pure gift; and no fraud. misrepresentation, &c.; with costs as to some, intended as a provision upon, and inducement to, the marriage of the Defendant: without costs as to others: the relation of the parties and the circumstances upon general principles of public policy and utility justifying inquiry.

Another lease decreed to be delivered up:

the verdict in an Issue establishing, that a full consideration was not paid.

## HARRIS v. TREMENHEERE.

**T**HE Bill in this cause, filed by the widow and children of *William Harris*, entitled as devisees of his freehold estates in the counties of *Devon* and *Cornwall* by his Will, dated the 11th of *November*, 1797, prayed, that several leases, obtained by the Defendant from the devisor, should be set aside.

The circumstances, under which this relief was sought, as represented by the Bill, were these. The testator, being in a great degree unacquainted with business, and violently afflicted with the gout, so as to render him incapable of attending to his affairs, the Defendant, an attorney of *Penzance*, taking advantage of those circumstances, prevailed upon the testator to appoint him to the stewardship and general management of his affairs. Previously to the year 1794 the Defendant had obtained great influence over him; and by means of that influence induced him to grant the following leases, which were the subject of this suit:

A lease of premises, called *Blake's tenement*; for ninety-nine years, determinable upon the death of a lady, whom the Defendant afterwards married; and another lease, to commence upon the death of a person, still living, at the rent of 11*s*. A lease of another tenement, dated the 7th of *July*, 1794, for ninety-three years; determinable upon the death of *Mrs. Tremenneere*: to commence upon the death of a person, since deceased: at the rent of 2*l*. 2*s*. A lease of a tenement, called *Palmer's*

*Palmer's* tenement, dated the 4th of *August*, 1795; in consideration of 150*l.*; expectant upon the determination of a life of seventy, for ninety-nine years, determinable upon three lives, at the rent of 1*l.* 1*s.* Another lease was dated the 27th of *April*, 1795, for ninety-nine years; determinable upon the deaths of the Defendant and his wife; with a power to the Defendant to name any one of their children as another life: at the rent of 1*l.* 1*s.* Another lease, dated the 27th of *November*, 1797, for ninety-nine years: to commence upon the death of two persons, still living, at the rent of 2*s.* The bill charged, that the consideration of 150*l.* for the lease of *Palmer's* tenement was not paid.

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v.  
TREMEN-  
HEERE.

The Defendant by his answer represented, that a great friendship subsisted between him and the testator; having been long known to each other; and being related: the father of the Defendant and the testator's grand father having been first cousins. The Defendant also stated, that he had rendered great services to the testator by reconciling him to his father; who by the Defendant's interference paid his son's debts; and redeemed annuities, which he had granted. The testator expressed his obligations to the Defendant; declaring, that he considered himself indebted to him for great part of his estate; and desiring the Defendant to continue to act as his steward; as he had acted for the testator's father.

The answer further stated, that the Defendant, being about to marry, and wishing to make a settlement, proposed to purchase from the testator a reversionary interest in certain premises; offering to pay a fair consideration. The Defendant offered him those premises, and any others he might wish to settle; declaring, that he would take no consideration, but only a small acknowledgment yearly; expressing the strongest wishes for the Defendant's hap-

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piness, &c. and desiring him to get the leases drawn. The leases of 1795 was a voluntary offer of the testator upon receiving a considerable accession of fortune; in order to give the Defendant a present benefit: the other leases being reversionary; and to insert his wife and child. The Defendant in the same year proposed to purchase *Palmer's* tenement: the life upon it then being seventy years old. The Defendant had it valued; and paid the amount of the valuation, 150*l.* by giving the testator credit in account, and paying the balance. The Defendant never applied to the testator to make such leases; but upon being pressed by him to receive some farther benefit, said, if the testator would grant him the waste of *Planning*, he might build a house; and the testator directed him to get the lease prepared. The Will contained a direction to the testator's son to continue the Defendant as steward; calling him his friend, &c. The Defendant admitted, that the leases were prepared in his office.

Sir *Samuel Romilly* and Mr. *Wetherell*, for the Plaintiffs, contended, as to the purchase, that a steward, taking from his employer a purchase, for a consideration merely nominal, is bound to shew, that he represented to his principal, that he was making, not a sale, but a mere gift; and as to that, which must be considered gratuitous; that it was not competent to a steward, having the management of the property, to accept a donation from his principal at that time: if, when all accounts have been settled, and the relation has ceased, the principal thinks proper to reward his services, he may: but a transaction of bounty between such parties, while the relation subsists, and the accounts are unsettled, cannot stand. They relied, farther, upon the particular circumstances: the incapacity and embarrassments of the testator; those circumstances well known to the Defendant; who was employed by the
 testator,

testator, not only as steward, but generally in his affairs, as his attorney.

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Mr. *Martin* and Mr. *Bell*, for the Defendant, insisted, that there was no instance of setting aside such transactions by a person, fully apprised of his own situation; and acting deliberately under the sense of great obligations, incurred in the management of his affairs; that there was no more equity for setting aside leases, than for getting back a pecuniary payment, made upon such a consideration, and under similar circumstances; in either case, the party being competent to do the act, it can only be effected by direct fraud, or undue influence: as a general proposition, it is not true, that a principal cannot make a gift to an agent, while the relation subsists; and in this instance the motive was, not only the regard, proceeding from friendship, and the consideration of service, in the actual sense, but also obligations of a very special and important nature.

Sir *Samuel Romilly*, in Reply.

It is not necessary upon all the circumstances of this case to maintain, that a person, sustaining the character of this Defendant, could not take a gift from his principal: but it is incumbent upon such a person to make out by evidence, that his principal knew what he did; that some third person was consulted; and that a distinct representation was made to him as to the value of the property he was going to convey. The Defendant is not prepared with such evidence; and all the circumstances, the state of the testator, both as to his health and his embarrassments, and the situation of the Defendant, having the management of his property and the general conduct of his affairs, the lease of *Palmer's* tenement, considered as a purchase, the reversionary lease upon a life,

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life, about seventy, contrary to his former resolution not to grant another reversionary lease, where only one life was existing, and that life above the age of sixty, involves these transactions in suspicion.

The Lord CHANCELLOR.

Having an extremely clear opinion upon this case, I shall not defer my judgment. The bill impeaches these several leases; obtained from the testator, under whom the Plaintiffs claim, by the Defendant; some for his own benefit: others for the benefit of some of his family; admitting other considerations than those, involved in the mere relation of principal and agent. The Defendant however stood in the character of agent and attorney to this gentleman; and in that character must be bound by a due application of all the principles of this Court, which upon grounds of public policy affect that relation. The Defendant, being the steward, agent, and attorney, of the testator, at the same time stood in a relation to him, that furnished considerations of kindness, as well as justice.

The real object of the testator in some of these leases was to make a provision for the lady, whom the Defendant afterwards married. As to the delicacy of the transaction, Courts of Justice have nothing to do with those considerations of imperfect obligation. A letter from the Defendant, proposing to become the purchaser of two of these tenements for the life of that lady, is in evidence. At that time the testator was so much indisposed with the gout as to be unable to answer it: but afterwards he sent to the Defendant a letter, which, unless I regard it with a jealousy, that would be inconsistent with the safety of mankind, shews, he was aware, that it was a proposal of purchase; and is evidence of his friendship for the Defendant. In strong language he vows, that
 he

he will take no consideration. I have no jurisdiction, authorizing me to set aside such a transaction; to hold, that under those circumstances, if he thought proper, he should not make such a disposition as this; simply for the life of that lady, individually; and intended as a provision for her. It is not necessary therefore to enter into the consideration of the principles, that determined the case of *Huguenin v. Baseley* (24). As to the interest of the Defendant, it is very difficult to maintain, that it could be affected, if the interests of his wife could not: that letter being an authority to the husband to hold out to her, that such were to be his situation and circumstances. Her interest would be affected by depriving him of that benefit, for which she contracted; and which she was induced to believe he would have. As to those leases therefore the Bill must be dismissed with costs.

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The consideration as to the other voluntary leases stands upon different principles; as they are pure gift; not connected with the proposed change of the Defendant's situation; as affecting the situation of a third person. With regard to those leases, I am not entrusted with a jurisdiction to say, what a delicate, or a prudent, consideration would have suggested: but upon reasons of public policy, though I must dismiss the Bill as to those two leases also, I shall dismiss it as to them without costs. I cannot find any decision, authorizing me to say, that the Defendant should not have taken these leases, as of the pure gift of his employer. I am quite ready to say, that, if I could find in the answer or the evidence the slightest hint, that the Defendant laid before the testator any account of the value of the premises, that was not perfectly accurate, that would induce me to set them

(24) Ante, Vol. XIV, p. 273. That Decree was affirmed by the House of Lords.

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them aside, whatever the parties intend, upon the general ground, that the principal never would be safe, if the agent could take a gift from him upon a representation, that was not most accurate and precise. There is no evidence of misrepresentation, circumvention, or any thing, improperly leading the testator to make these leases; that they were not the spontaneous fruit of his own generosity; not weighing the value or amount of the consideration, that should have been given, if it had been the subject of barter. But, where a person in that situation takes leases without calling in third persons, a suspicion attaches upon the transaction; and justifies the examination; and this Court never ought to give costs upon the result of that examination, where the party has not interposed any other person. As to those two leases therefore the Bill must be dismissed without costs.

The premises, described as *Palmer's* tenement, fall under a perfectly different consideration. Upon general principles I cannot according to the evidence now before me dismiss the bill as to that part of the case. This is a lease, granted, not gratuitously, but for consideration: granted upon the proposition of the Defendant; and it is a lease for three lives, expectant upon the decease of a person at the age of seventy. This lease was taken, when it was clearly understood between them, upon the determination of the Defendant himself, bound by his duty to consult the interest of his employer, and not hastily to depart from the general principle, which had governed him, that it was not for the interest of the testator to grant any reversionary lease upon one life: that life being above the age of sixty. The Defendant is in this situation; being the person, who is to acquire the interest, and also the person, who ought to advise the grantor, he imposed upon himself the duty of informing himself

himself fully of the value, and of acting in favour of his employer as adversely against himself, as he would against any other person, with whom, acting fairly for his employer, he was making the best bargain he possibly could. The Court expects that from him under such circumstances. When he became the purchaser in such a transaction, the circumstance, that he was the attorney, who carried it into execution, was as improvident a measure as a man of prudence and respect could take; though the result may be the same, as if other persons had been employed; as, whenever these circumstances concur, the Court is bound upon principles of public utility and public policy to search the transaction to the bottom.

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The statement by the answer, that this lease was granted in consideration of 150*l.*, for three lives, all very young, cannot have any effect; when I am uninformed as to the capacity of improvement, and other circumstances, which the duty of the Defendant, acting as a steward, required him to attend to. The consideration expressed, if paid down at the time, may be nothing like the actual consideration; depending upon the comparative value of the life, on which the premises were held, and of the other lives. I will not examine, whether the consideration was, or was not, paid down; though the time of payment is of the very essence; where the subject is a reversionary lease. I must come to the same conclusion, as if the money had been paid in 1795. First, there is not sufficient evidence, that this was a proper bargain; and that is not to be presumed. Evidence might have been given upon the comparative yearly value of the premises at the time; or, that repairs were wanting: but there is no such evidence. There appears also to have been a habit of calculation as to value in these manors: it is said fourteen years is the rate of purchase; and there must have been a rate of purchase; otherwise they could not have come

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come to the resolution not to grant reversionary leases upon a life of the age of sixty. With regard to this there is no evidence on the part of the Defendant: there is evidence for the Plaintiffs: evidence, which, though far from precise certainly, makes a strong impression on my mind.

With regard to this lease therefore, considered as a lease which an agent, steward, and attorney, took from his client, master, and employer, in the grant of which, as being made upon a proposition of purchase, this Court cannot permit any motive of kindness and gratuity to be mixed, upon principles of public utility and public policy, if any doubt is raised, the Defendant must be required to shew, that he made as good a bargain for his employer, as against himself, as a provident, well-managing, honorable, steward, acting most adversely, in a fair sense, would; that he paid the full amount, that he could have obtained from any other person. The evidence upon that has not satisfied me. Therefore either an inquiry or an issue must be directed, upon the question, whether 150*l.* was the full consideration for the interest, granted by that reversionary lease.

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By the Decree the Bill was accordingly dismissed, with costs as to some of the voluntary leases; and without costs as to the others; and as to the lease of the 4th of August, 1795, of *Palmer's* tenement, an issue was directed upon the question, whether the 150*l.*, paid by the Defendant was, or was not a full consideration. The verdict upon the trial being, that it was not a full consideration, a Decree was afterwards made; directing that lease to be delivered up (25).

(25) Ante, *Newman v.* tinct from the relation of *Payne*, Vol. I, 109, and the Attorney and Client, *Lord* note, 204. See the case of *Hardwicke v. Vernon*, IV, Principal and Agent, dis- 411, and the note, 418.

## FINCH v. FINCH.

1808.

March 21st.

**A**T a Court Baron, held for the manor of *Ramsbury*, Purchase in on the 30th of *October*, 1776, *John Finch* the elder, being seised of copyhold premises within the manor, for the life of *John Green*, the Plaintiff *John Finch* the younger, nephew of *John Finch* the elder, took of the lord, according to the custom; to hold in reversion from and immediately after the death of *Green*, or the surrender, forfeiture, or other sooner determination of the estate and interest in the premises, held for the life of *Green*, unto *John Finch*, then of the age of three years, and *William Finch*, then of the age of two years, sons of *John Finch*, the nephew, for and during the term of their natural lives and the life of the longer liver of them successively at the will of the lord according to the custom of the manor; and for such estate so to be had in the premises, the Plaintiff, who was, and is therein described as the sole purchaser thereof, gave to the lord a fine of 250*l.*: but the admission and fealty of *John* and *William Finch*, the sons of the Plaintiff, was respited.

*John Finch*, the Plaintiff's uncle, died in 1782; having by his Will, dated the 8th of *November*, 1776, given his copyhold and leasehold estates to the Plaintiff; and appointed him executor. The Plaintiff upon the death of his uncle entered upon the copyhold estates; and at a Court Baron, held upon the 22d of *October*, 1790, it was presented, that *Green* had died; that upon his death a heriot became due; and that the Plaintiff, the purchaser of the said premises in reversion, and who was in possession of the said premises at the time of the death of

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of *John Green*, came into Court; and compounded for the heriot; and *John Finch* (his son) then a minor, came into Court; and prayed to be admitted tenant by the Plaintiff, his father and natural guardian; and was admitted according to the custom.

The Plaintiff's son having brought an Ejectment, the Bill was filed; praying a declaration of the Plaintiff's title and to the copyhold estates for the lives of the Defendants, his sons; that the legal estate may be declared to be held by the Defendant *John Finch* in trust for the Plaintiff, his executors, &c.; that the Defendants may surrender, or hold, accordingly; and an Injunction.

A Motion was made to dissolve the Injunction; upon the answer of *John Finch*; insisting, that a purchase by the father in the name of his son was to be considered as an advancement.

Mr. Leach, and *Mr. Wingfield*, shewed cause against dissolving the Injunction.

The questions are, first, whether there is a *prima facie* title in the son; rebutting the resulting trust from the admission of the father, as the purchaser: secondly, if the son has a title *prima facie*, sufficient for that effect, whether the injunction should be dissolved without giving an opportunity to the Plaintiff to go into evidence to repel that title. The cases upon claims by way of advancement, are, either where the purchase was immediately in the name of the son; or, the father being first named, the son's name was introduced as to take in succession after him. This is a claim to take in succession upon the death, not of the father of the claimant, but of a stranger. A purchase being taken in the name of the son of the purchaser, no reason appearing for not taking

taking it in his own name, there is a ground for supposing an intention of advancement: so, where the sons are to take in succession after the life of the father, that, being the natural course of devolution, affords a strong inference of an intended provision: yet even in that case a distinction was taken; which has been but lately over-ruled. In the case of *Dickinson v. Shaw* (26) the Lords Commissioners held, that there was no *prima facie* title in the children; as, the custom being to take for three lives (27), the father might consistently with the intention to take the whole interest name his sons as the two other lives; and that circumstance therefore did not afford a presumption, that would repel the resulting trust for the father. That case was however over-ruled by *Dyer v. Dyer* (28); Lord Chief Baron *Eyre* deciding, that, where the sons were named to take in succession after the father, that was *prima facie* an advancement: so as to throw the proof upon the other side.

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This Plaintiff at the time of his purchase had no interest: the interest being in his uncle; who by his Will, made only eight days afterwards, which may be considered part of the same transaction, gave the interest he had to his nephew. This is therefore distinguished from the other cases in this respect; that it is not a purchase in the name of a child alone. It is not necessary to maintain, that a father can never be intended to purchase a reversion for his child. This is not a purchase of a dry reversion: nor is it a purchase to take effect

(26) In Chancery, 22d May, 1770. Stated 1 *Watkins on Copyholds*, 222. Baron *Eyre* says, there was no custom stated.

(28) 1 *P. Will.* 112, 5th ed.

(27) In the Report of this case, 1 *Watkins on Copyholds*, (see page 222) Lord Chief Mr. *Cox's* note: fully reported, 1 *Watkins on Copyholds*, 216.

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effect after the death of the father : but it is to be considered a purchase by the father for the life of *Green* ; and a provision, if so intended, to take effect after the death of *Green* : his age not appearing farther than that he had been fifty-eight years tenant of this copyhold estate. Can the father be supposed to intend, for the purpose of making a provision for these two children, to divest himself of the possession and enjoyment of his own estate upon the death of a stranger, wholly unconnected with the family, with whom therefore these children had no connection ; from whom they could expect no bounty : the children being so young, that the death of that person might be expected, before they could want provision ? The language of the copy itself supports the inference, that the father intended to purchase for his own benefit and enjoyment ; not for the purpose of advancement. So, the presentment in *October* 1790, upon the death of *Green*, seems by its language also to imply, that the father considered himself entitled for his own benefit ; coming in and compounding for the heriot, not as guardian, but as the purchaser, recited to be in possession.

If however this should be considered *prima facie* an advancement, the son cannot be permitted to take the possession from his father ; who may have irresistible evidence to repel the presumption. The Court will never change the possession, while a doubt remains. The father, whose possession has been uninterrupted, and who in every act has treated this property as his own, may perhaps prove declarations, previous to the purchase, that he did not intend advancement ; but put in the lives of his sons ; as thinking it better to do so than to put in his own. He may also be able to prove, that the same Will, which gives him this copyhold estate, gives an ample provision to his two sons ; which is the fact : the freehold estates being devised for their benefit. In *Dyer v. Dyer*

(29) Lord Chief Justice *Eyre*, meaning to discredit decisions of Lord *Nottingham* and Lord *Hardwicke*, understands two things, which have no resemblance. It was only held, that, when this Court was called upon to aid the imperfect execution of a power, or to supply the want of surrender, it was a sufficient objection that the child was already provided for; and therefore there was no meritorious consideration for assisting the child, a Plaintiff, against the eldest son and heir. In other times however that has not been so held; for the reason, that, if it turns upon the sufficiency of the provision, the Court has no means of arriving at a legitimate conclusion upon the question, what is a proper provision with reference to the circumstances of the case; and upon that principle the intention alone has been held to raise a meritorious consideration, without reference to any other circumstance (30). What relation does that to the case before Lord Chief Justice *Eyre*? In all those cases a father intends a provision for the child: that intention is plain; and the only doubt is as to the extent of the provision: here the very question is, what the father intended. Can that be a question, where the father has no provision, except the estate so purchased, perhaps considerably improved; and the son has no ample provision? The long acquiescence of the defendant, until he had reached the age of thirty, makes it probable, that much evidence may be required.

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Sir *Samuel Romilly*, for the Defendant.

The case of *Dyer v. Dyer* has been always considered as settling the law upon this point; has been recognised

(29) 1 *P. Will.* 112, 5th ed. (30) *Hills v. Downton*, ante, *Cox's note*, 1 *Watkins on* Vol. V, 557. *holds*, 216.

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cognized ever since; and was never questioned. The law, as there established, is, that, when a purchase is made, or a lease taken, in the name of another, the person, paying the consideration, is in equity considered as beneficially entitled; and the party, whose name is used, as a trustee; with the qualification; that if the person, whose name is used, is the child of the purchaser, that is *primâ facie* an advancement: but it is competent to the father to shew, that he did not intend advancement; but used the name of his child only as a trustee; and that proof lies upon the father. Lord Chief Justice *Eyre* laments, that the rule does not go farther; that the child has not been considered to all intents the purchaser; admitting, that it is too late now to go that length. In this case therefore the proof is on the Plaintiff; and the Court is required to collect the probable intention from a number of particular circumstances, of no weight: on the contrary, this is a much stronger case for advancement than *Dyer v. Dyer*, or any other.

The statement upon the Court Roll, describing *Finch*, the father, as the sole purchaser, is correct: but the question remains, whether he is the purchaser for himself, or his children. Can that question be put upon such slight circumstances: the age of the person in possession: the uncertainty, whether the reversion was likely to fall in at one time, or another; or the devise? Upon that hypothesis there is no rule; and, contrary to the usual course, an issue ought to be directed in every case. In the case of *Dyer v. Dyer* the father's life was already named: the estate was taken for the lives of himself and his two children. Lord Chief Justice *Eyre* concludes his judgment by observing (31), that these cases partake of too great a degree of refinement; and should not prevail

(31) 1 *Watkins on Copyholds*, 226.

prevail against a rule of property; which is so well established as to become a land-mark; and which, whether right or wrong, should be carried throughout. The argument has always been, that the party must name some one; and if he does not name himself, which is most natural, you cannot collect any other reason, why he should put in his child's name, than the advantage of the child. The life of this Plaintiff must have been much more valuable than that of his children. He was probably at that time of the age of thirty-eight or forty: certainly a much better life than a child of three years old: a life, more valuable for a stranger; much more for the parent.

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The circumstance, that the father's life was already inserted, was much relied on in the case of *Dyer v. Dyer* (32): but it is extremely important, that such a point should be determined upon some general rule; not upon particular circumstances; which may very differently affect different minds. None of the facts, alluded to as likely to be proved, are put in issue; and as to one of these alleged facts, that these children are provided for by the Will of the uncle, a provision by Will can never be considered as a provision during the life of the testator.

Mr. Leach, in Reply.

Where the purchase is made immediately in the name of the child, the intention to provide for that child is plain: so, if the child is to take after the father: that being the natural course: but it cannot follow from those cases, that the father is to be intended to deprive himself of the present interest, which he has, upon the death, not
of

(32) 1 P. Will. 112, 5th edit. Mr. Cox's note. 1 Watkins on Copyholds, 216.

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of himself, but of a stranger, not connected with the family. That circumstance is strong against the inference. This act of the father and the Will of the uncle are to be considered as one act: the father having a view to that Will, so likely to influence him. The Plaintiff has a right to enter into every circumstance, that will sustain the issue, offered by the Bill; and it is not required, that the Bill should state all those facts. At least leave would be given to amend in that respect.

The Lord CHANCELLOR.

It is not necessary to determine, how much the Plaintiff was obliged to charge in his Bill: nothing particular being charged, I cannot give credit for the truth of every thing, that can be suggested at the bar. I remember the case of *Dyer v. Dyer* (33); which was very fully considered; and the Court meant to establish this principle; viz. admitting the clear rule, that, where *A.* purchases in the name of *B.*, *A.* paying the consideration, *B.* is a trustee, notwithstanding the Statute of Frauds (34), that rule does not obtain, where the purchase is in the name of a son: that purchase is an advancement *primâ facie*; and in this sense; that this principle of law and presumption is not to be frittered away by nice refinements. Therefore, if the purchase was of a fee simple immediately, *primâ facie* the son would take: so, if it was a purchase of a reversion; and it is very difficult upon the mere circumstance of the proximity or possible remoteness of possession to do that away. Nothing could be stronger than the circumstance in *Dyer v. Dyer* that the purchaser

(33) 1 *P. Will.* 112, 5th edit. Mr. Cox's note. 1 *Watkinson Copyholds*, 216. Ante, *Rider v. Kidder*, Vol. X, 360. *Marless v. Franklin*, 1 *Swanst.* 13. *Prankerd v. Prankerd*, 1 *Sim. & Stu.* 1. (34) Stat. 29 Ch. II. c. 3.

chaser had actually devised it. He certainly took it to be his own: but he happened to mistake the rule.

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It is said, this case does not afford so natural a presumption: the father's life not being inserted: but I can conceive a purchase of an estate, held for a life: the purchaser meaning to give the reversion upon the determination of that life to his children; and that life and those of his two children may be better than his own life and those of his children. I cannot however conceive, that this mere circumstance can countervail the rule. It is supposed, that Lord Chief Justice *Eyre* did not reason accurately by analogy to the cases of powers and copyholds. It is rather difficult to make out, how the defect in those cases came to be supplied in favor of a child. If in the instance of the want of a surrender of copyhold estate the circumstance of the devise to the child is considered, the more natural conclusion is, that, the testator, whatever his purpose was, going only so far towards it, and not proceeding to make it effectual, had dropt it. So, the attempt to execute a power is no more than an intimation, that the party means to execute it: but, if all the requisite ceremonies have not been complied with, it cannot be supposed, that the intention continued until his death (35). In this case the father paid the money. If he and another person had purchased jointly, the presumption, from the act of the father alone, would not naturally arise from the joint payment. The Will of the uncle cannot have any effect. Even if the father had made such a Will, having made no declaration at the time of the purchase, that Will could not have been looked to as evidence of what he meant by the act of a purchase.

As to the reason of supplying a defective execution of a Power, or the want of a surrender of copyhold estate, for a child, *Quere.*

The

(35) See *Holmes v. Coghill*, ante, Vol. VII, 499. XII, 106.

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The consequence is, that the possession being changed by the law, those, who insist, that the son is a trustee for the father, must make that out; and may then call for a re-conveyance. The legal title and the presumption at present go together; and the relief must be obtained by the father hereafter, separating the legal title from the presumption. At present I am not entitled to separate them.

The Order for dissolving the Injunction was made absolute.

1808.

April 5th, 11th.

SADLER AND JACKSON, *Ex parte*.

Upon a composition a private agreement by some creditors for additional security, though for no greater sum, void. Creditors bound by acting under a composition, as if they had signed.

THE prayer of this petition in bankruptcy was to be permitted to prove under a Commission against *Edward Morgan* four notes, payable at three, four, seven, and nine months after date, in the following form:

"London, 14th April, 1806.

"Three months after date we promise to pay to the order of Messrs. *Sadler and Jackson* 173*l.* 10*s.* 10*d.*
"Value received.

"*Ed^d Morgan.*


"*Th^s Hogg.*

"*Holmes & Hogg.*"

Proof by joint creditors under a separate Commission; there being no joint estate or solvent partner.

In the year 1805 the petitioners had refused to sell any goods upon credit to *Holmes* and *Hogg* without security. *Holmes* and *Hogg* accordingly deposited the acceptance of *Morgan* for 700*l.* at twelve months, and an acceptance of *Thomas Hogg* for 200*l.* as security for goods, to

to be supplied. Upon the deposit of these bills the petitioners dealt upon credit with *Holmes and Hogg*; who in *April* 1806 were indebted to the petitioners to the amount of 1388*l.* 6*s.* 8*d.* In that month *Holmes and Hogg* called a meeting of their creditors; when the petitioners signed a memorandum; agreeing to accept a composition of 17*s.* in the pound; part of which composition, 7*s.* in the pound, was to be secured by *Dickinson*; and the remaining 10*s.* in the pound by the promisory notes of *Holmes and Hogg*: the agreement to be void, unless signed by all the creditors before the 31st of *May*, 1806.

1806:

 SADLER
 and
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When the deed of composition was tendered to the petitioners for execution, an application was made to them to deliver up the two acceptances for 700*l.* and 200*l.*; which they refused to do. They also refused to execute the deed: but upon receiving the four notes, which were the subject of the petition, and which were equal in amount to the instalment of 10*s.* in the pound under the composition, to be secured by the notes of *Holmes and Hogg*, and payable at the same periods as that instalment, they gave up the two acceptances; and executed the deed.

The original agreement of 1806 was not signed by all the creditors. The deed of composition was signed by six creditors only; who, according to the petition, had notice that the petitioners held the acceptances for 700*l.* and 200*l.*, or the four promisory notes, substituted for them. The whole number of creditors was eleven. The petition stated, that there was no joint estate of the persons, who gave the four promisory notes; who were not concerned together in partnership, except in this single transaction.

Sir

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Sir *Samuel Romilly*, and Mr. *Gyffn Wilson*, opposed the petition; first, as attempting to prove a joint debt under a separate Commission; secondly, contending, that this case was governed by the class of cases, relating to compositions, particularly *Leicester v. Rose* (36), overruling *Feise v. Randall* (37).

Mr. *Montague*, in support of the Petition.

Admitting, that, if a creditor, having a security for his debt, enters into any agreement with the principal debtor, by which the right of the surety is varied, without his consent, the surety is released, and that, where a creditor in consideration of executing a deed of composition accepts a security for a greater sum than that, which is to be received by the other creditors, or a greater security for the same sum, the security is void, the decisions upon this subject are limited to the case of a security, received in consideration of executing the deed of composition; not preventing a debtor from giving a security for the residue of the debts, when he has surmounted his difficulties; nor invalidating a security, which the creditor held long before the composition was in contemplation. In this instance the security given to the particular creditor corresponds with the composition in the amount of the sum and the time of payment. The surety consented; and cannot complain; and the creditors, having notice of the securities, have no reason to complain.

In support of the other objection, that this petition seeks to prove a joint debt under a separate Commission, in the late case *Ex parte Kensington* (38) the rule, established by Lord *Rosslyn*, which has been followed, rather to avoid farther fluctuation, than as entitled to a preference, was extended by requiring for this purpose

proof,

(36) 4 *East*, 372.

See *Ex parte Elton*, III, 238,

(37) 6 *Term Rep.* 146.

and the note, 243.

(38) *Ante*, Vol. XIV, 447.

proof, not only that there is no joint property, but also, that there is no solvent partner (39). The fact is, that all these persons are insolvent.

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SADLER
and
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Ex parte.

The Lord CHANCELLOR.

I was not aware of the last decision in the Court of King's Bench; that, where the security is for the same sum, which is secured by the general composition, it is a fraud upon the creditors: but I am much struck with it; and think, there is much principle in it. Where the security is for a larger sum than the composition, it is considered a fraud upon the debtor; as, if the surety pays the larger sum, he has immediately a demand over against the principal; who then has not the benefit of the agreement, which his creditors in general intended to give him. It is also considered a fraud upon the creditors: the reasoning upon an agreement of this sort being, that it is produced by the humanity and feeling of the creditors towards the debtor; but, if it is competent to six out of seven creditors to obtain sureties, even for the same amount, the seventh is imposed upon; as, instead of having the evidence of the other six, that the act, which he is about to do, is reasonable, proved by the same act on their part, he is circumvented by them; obtaining, as against him from their debtor, an advantage, which they will not give him as against themselves. They mislead that creditor into a situation, in which their own acts shew they think it unreasonable that he should be placed. If therefore the petitioners have a security for the same sum, that is a stipulation for a value and benefit, of which the other creditors are deprived; and my present opinion is, that the last case in the Court of King's Bench is right (40).

Ground of holding any private agreement by parties to a composition for a greater payment or better security void: a fraud both upon the debtor and the other creditors.

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(39) See the note, post, *Scott*, Vol. III, 456, and the Vol. XVI, 194, *Ex parte* note, 461. *Mawson v. Stock*, *Taitt*. VI, 300, and the note, 309.

(40) Ante, *Eastabrook v.*

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As to the allegation, that some creditors had not signed the agreement, if a creditor acts upon the agreement, he is bound as much as if he had signed; and as to the objection upon the solvency of the other parties, there is enough to shew, that they are all insolvent within the rule, stated in *Ex parte Kensington* (41).

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*The Lord CHANCELLOR.*

*April 11th.*

The first objection to this petition is, that it is an attempt to prove joint notes under a separate Commission. The answer is, that there is no joint estate: but the reply to that is, that, though there is no joint estate, some of the makers of these notes are solvent. It is not necessary to renew the discussion upon that point, which occurred lately in the case *Ex parte Kensington*; as I am satisfied, that there is enough to shew, that they were not in circumstances to raise that question, that they were not solvent.

The next objection is, that these four notes, as far as *Holmes* and *Hogg* were concerned, were a fraud upon those persons; who were making a composition with their creditors; that they were also a fraud upon the creditors; and therefore by the policy of the Law no person, who signed these notes, is bound by them. Under the circumstances of this case, I think, the last decision of the Court of King's Bench reaches it. The deed of composition, speaking the language of all the creditors, not only to their debtor, but to each other, is a common declaration, that the securities, mentioned in that deed, are to be taken in full discharge of their respective debts; and they covenant with *Holmes* and *Hogg* accordingly,

cordingly, that the sum, so secured, is to be in full satisfaction and discharge of their respective debts; and that without any reserve: each creditor releasing and discharging *Holmes* and *Hogg* and each of them: so that neither they, nor their representatives, shall have any claim or demand, &c. If the transaction had stood upon this agreement, the effect of it would be this: debtors, meeting their creditors; and offering a composition of 17s. in the pound, secured according to that proposal; pressing upon the humanity of each creditor; and representing to each individual, that every other creditor has acceded to that proposal: every creditor, who signs, thereby making the same representation.

It seems to have been suggested to the petitioners, that the execution of this instrument would put an end to the bills of 700*l.* and 200*l.* then in their possession, applicable to their demand; and certainly that would have been the effect of it. They agreed therefore to give up those securities; stipulating however to have *Morgan* and *Thomas Hogg* as sureties for the four instalments of the composition, as well as the security, which the other creditors were to have for those payments. The question upon that is, first, whether the fact was known to all the rest of the creditors: if it was not, secondly, as to the consequence. Those, who contend, that it was known to all the creditors, are bound to prove it; and upon the evidence it seems, that it was not known to all the creditors: that however, if doubtful, may be the subject of inquiry.

As to the effect in law, taking the fact not to have been known to all the other creditors, I had, when I first read this petition, a notion, which turns out to be erroneous; that, if a collateral security was given only for the same amount as the general composition, that would not be

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be a fraud. That was the opinion of Lord *Kenyon* in *Feise v. Randall* (42); with regard to which case I take the liberty of saying, in terms less qualified than the language of the Court of King's Bench in *Leicester v. Rose* (43), that the former case is over-ruled. The antecedent security makes no difference. The parties clearly thought that it did not; conceiving, that it would be destroyed by the subsequent instrument. They must therefore be considered, taking a new security, to all legal effect as if they had not an antecedent security. Upon principle, then, if two creditors inform a third, that upon their view of the justice and humanity of the case they are so seriously persuaded, that the other ought to take the security of the debtor for 17*s.* in the pound, and to discharge him from the rest of the demand, and, not only to take his own security, but not to oppress him by requiring any other person to come under an obligation for payment; can a clearer misrepresentation be stated, than that at the same instant, when they are desiring that creditor to take the security of the debtor himself alone, they are procuring the security of other persons for themselves? The principle being, that in such a transaction all should deal upon equal terms, that a creditor ought to be put in a situation, that would enable him to require, that those persons should become security for him also: at least the creditors, obtaining that security, ought not to represent, that they are not obtaining it: but, proposing to the other creditor to deal upon equal terms, they ought to impart to him all the benefit of that security.

This is therefore in principle a direct contradiction of the good faith of the transaction. The legal effect also of this instrument, executed, after those notes were given,
 is

(42) 6 *Term Rep.* 146.

(43) 4 *East*, 372.

is a release. The case of *Leicester v. Rose* (44) is a direct authority against this petition. The circumstances, stated in the report of that case, are not material to the reasoning, upon which it is supported. The principle does not rest upon those facts. The judgment of the Court of King's Bench is unanimous, that the case was brought within the authorities; and, if I may presume to say so, they decided right. I concur in the doctrine, there laid down; and consequently, whatever was the intention of these petitioners, their case appears to be within the principle and reasoning of that authority; and their proof cannot be admitted.

I do not object, if there is any doubt upon the facts, to let them put it in some mode of trial. They must make out, that all the creditors knew this; as *prima facie* upon the instrument it must be taken, that they did not know it. The point, as to the execution of the instrument, is not, whether they actually signed. In this jurisdiction, which is both legal and equitable, a creditor, who has not signed, may be bound; if by any act he has assented.

The Petition was dismissed.

(44) 4 *East*, 372.

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YALLOP, *Ex parte*.

April 28th.

The Registry of a Ship is conclusive evidence of the property upon the policy of the Registry Acts; even against the claim of creditors, upon a joint purchase and various acts of apparent ownership, within the Bankrupt Act, 21 Jam. I. c. 19, s. 11.

Distinction between transfers by the act of the parties, and by operation of law.

IN April, 1805, *Henry Cooke* and *John Herbert*, partners, as merchants in *London*, contracted to purchase the ship *Euphrates*, employed in the service of the *East India Company*, for 20,000*l.*; and accordingly in *May* or *June* they accepted eleven bills of exchange, drawn by Messrs. *Clay*, the owners of the ship, to that amount; and, as a collateral security, *Cooke* and *Herbert*, being each possessed of five sixteenth shares of the ship *Devonshire*, by bill of sale, dated the 22d of *June*, 1805, severally assigned their shares of that ship and the policies of insurance, effected by them on such shares; by a defeasance of the same date, reciting the purchase of the *Euphrates*, as made by *Cooke* and *Herbert*, and declaring those policies to be for farther securing the 20,000*l.* *Philip Herbert*, the brother of *John*, agreed with his brother and *Cooke* to purchase one fourth of the ship; and accordingly a bill of sale of one fourth was made to *Philip Herbert*; who gave security to *Cooke* and *Herbert* for the price of one fourth of the ship and her outfit. A bill of sale of the remaining three fourths was made to *Cooke* alone; and the usual indorsements were made on the certificate of registry under the Registry Acts (45); declaring, that Messrs. *Clay* had sold three fourths of the ship to *Cooke*, and one fourth to *Philip Herbert*.

The ship was taken up by the *East India Company*; and her outfit, amounting to 7672*l.* 6*s.* 10*d.* was furnished by *Cooke* and *Herbert* jointly; and insurance was made by

(45) Stat. 26 Geo. III. c. 60. Stat. 34 Geo. III. c. 68.

by them jointly on three fourths of the ship, as their joint property; the shares were treated in their partnership books as their partnership property; their Commission, as managing owners, was debited to the ship in their partnership books; and every act was done, short of an actual conveyance and registration in their names, which could mark those three fourths of the ship as the joint property of *Cooke* and *Herbert*. On the 8th of *July*, 1805, a new register was taken out by *Cooke* and *Philip Herbert*; and they were declared to be the owners, and *Philip Herbert* the master. *Cooke* after the departure of the ship made over by bill of sale several small shares as a security for separate debts of himself and joint debts of *Cooke* and *Herbert*. In *December* 1805, a joint Commission of Bankruptcy issued against *Cooke* and *John Herbert*. Their acceptances on account of the purchase-money of the ship had been paid, to the extent of 7500*l*. The sum of 12,500*l*. remaining due to Messrs. *Clay*, was claimed as a debt against the joint estate of *Cooke* and *Herbert*. The assignees sold the three fourths of the ship for 7175*l*.

1808.

YALLOP,
Ex parte.

The petition was presented by a joint creditor of *Cooke* and *Herbert*; praying an application of the three fourths of the ship, and the produce, as their joint property.

Mr. *Richards*, and Mr. *Owen*, in support of the Petition.

The question upon this Petition is, whether the interest in this ship must under the Registry Acts (46) be considered as separate property to the prejudice of the separate creditors. The principle, upon which the Registry

(46) Stat. 26 Geo. III. c. 60. Stat. 34 Geo. III. c. 68.

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try Acts were framed, cannot be effected by treating this as joint property. The case of *Curtis v. Perry* (47) contains many circumstances, that are not to be found in this case: first, Mr. *Chiswell*, being a Member of Parliament, could not hold an interest in such a concern: and a claim under him could no more be admitted in a Court of Equity than a bill for a reconveyance of a qualification for a seat in Parliament (48). *Nantes*, the other partner, when he became a bankrupt, was the sole owner in every point of view. This is a dry case, that has never been decided; involving a question, which, as it did not arise in that case, your Lordship anxiously avoided; a conveyance of a ship to one partner; paid for by the joint effects: dealt with as joint property; so as to be within the Statute of *James I.* (49); and being joint property to all intents and purposes, except in the view of the law, with reference to these Acts of Parliament. The Legislature has not in either of these Acts intimated, that cases of this sort may not exist. Whatever may have passed between the partners, whatever object they may have had, either to press upon the joint creditors, or to serve any private convenience of their own, the joint creditors are, as against them, entitled to say, this is joint property; and consequently as against their separate creditors.

Sir *Samuel Romilly*, Mr. *Cooke* and Mr. *William David Garrow*, for the separate creditors.

This case cannot be distinguished from the cases of *Camden v. Anderson* (50), and *Curtis v. Perry* (51); with the exception of the single circumstance, in the latter case,

(47) Ante, Vol. VI, 739.

(50) 5 *Term Rep.* 709.

(48) Ante, Vol. VI, 747.

(51) Ante, Vol. VI, 739;

(49) Stat. 21 *Jam. I.* c. 19. see the note, 745.

s. 11, 6 *Geo. IV.* c. 16. s. 72.

case, that the transaction was one, in which it was not proper, that the name of *Chiswell* should appear; but the determination was not upon that ground, nor upon the distinction between trusts expressed and implied: but it was upon the distinction between trusts implied, or arising by operation of law, and arising by the acts of the parties. Your Lordship most guardedly took that distinction (52); and considered the case of trusts, arising by the acts of the parties, as within the Statute. It is impossible to answer the arguments, upon which that decision was made. This petition states, that the bill of sale of the share of this ship was made to *Cooke* alone; not to *Cooke* and *Herbert*; who had one fourth. The case is therefore this; that these two persons, desiring to purchase an interest in this ship, found it convenient, that the registration should be in the name of one of them only. If this case is not within the Act of Parliament, it is a dead letter; and can have no operation. It will never be necessary to register the real owner, if the persons registered become trustees upon the doctrine of implied trusts, for those, who agree to be the owners.

The objection upon the Statute of *James I.* (53), which could not apply in the case of *Curtis v. Perry*, does apply to this case in favor of the separate creditors. The person, registered as the sole owner, is the person, who has the visible order and disposition of the ship; and the other owner, having permitted his partner to hold out to the world by this authentic document, that this interest in the ship was his separate property, could not, if he had remained solvent, have maintained a claim against the effect of that Statute: *Cooke* being the apparent

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Ex parte.

(52) Ante, Vol. VI, 746.

(53) Stat. 21 *Jam. I.* c. 19. s. 11.

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parent owner by the registry, and the possession in him, as such registered owner up to the bankruptcy; and the assignees having sold in his right accordingly. The registered owner is so universally considered as the proprietor, that, if he contracts to sell the ship, and attempts to make the transfer, not in the mode, prescribed by the Act of Parliament, he still remains the apparent owner, and liable as such for repairs, though not ordered by him: *Westerdell v. Dale* (54). A stronger case cannot be put to shew, that by law the registered owner is the real owner; until he parts with the ship according to the directions of the Act of Parliament.

Mr. *Richards*, in Reply.

This case is perfectly new in circumstances; and is not touched by the principle, upon which *Curtis v. Perry* (55) was decided. In that case your Lordship thought the circumstances ought to be taken into consideration; and with the view to ascertain, whether the parties had treated the ship as joint property, an inquiry at the Custom House was directed, who had been there represented as the owners; which inquiry, though fruitless, shews, that the registry alone was not conclusive upon the title; and that the acts of the parties are material. The admitted acts in this instance are insurances, effected in the names of both, and every other act, which legal partners in this ship could have done: with the single exception of a joint registry. In this respect the case of *Curtis v. Perry* is wholly dissimilar. *Chiswell's* character, as a Member of Parliament, disqualified him from having any interest in that ship: an invincible obstacle to the claim under him, as a partner. His object necessarily was to keep himself as constantly out of the Concern, as out
of

(54) 7 *Term Rep.* 306.

(55) *Ante*, Vol. VI, 739.

of the registry; and *Nantes* therefore was the owner, not only upon the face of the registry, but to all intents and purposes. The circumstances of that case therefore fall far short of the point, which must be maintained here by the separate creditors: viz. that an interest in a ship cannot be shewn to be in any person by any species of dealing; unless the name of that person appears in the registry. These acts must be considered as capable of forming a trust by operation of Law; according to the distinction, taken in the judgment of that case; and such cases, as in the instance of executors and assignees, are necessarily not within the Statute.

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YALLOP,
Ex parte.

With respect to the Statute of King *James* (56), the ship could not have been in the disposition of *Chiswell* at the period of the bankruptcy; which he did not live to reach; and, as to the time previous to his death, he did not appear, and must be presumed not to have intended to appear; as the owner. These parties, on the contrary, appeared, and acted uniformly, as owners. No one could doubt upon it without looking at the register. There is no doubt, that this purchase was made out of the joint fund; and, as far as appearances went, they were both clearly the visible owners, as much as if both names had been in the registry. In *Robertson v. French* (57) the appointment of captain was held sufficient evidence of ownership to support the declaration.

The Lord CHANCELLOR.

Upon every view of this case, as it appears to me, a judgment, that this interest in a ship should be taken as joint property, if the question arose in a contest between the partners themselves, would destroy the whole effect of

(56) Stat. 21 *Jam.* I, c. 19, s. 11.

(57) 4 *East*, 130.

1866.

YALLOP,
Ex parte,

of these Acts of Parliament. The consideration having been paid by bills, making them both liable, those bills, when paid, are evidence, but no more than evidence, that the money, which formed the consideration for that purchase, was joint property. Though it is not necessarily so, I will take that as a clear fact. The partnership property therefore having purchased this interest in the ship, the bill of sale was made, as it must be taken, with the consent of both parties, to one of them only; and the registry was made in the name of one; which also must be taken to be with the consent of both: the petition not suggesting the contrary. The registry could not have been granted without an affidavit by *Cooke*, that he was the sole owner; and the fair conclusion is, that *Herbert* knew what was done.

Policy of the
Registry Acts.

These two Acts of Parliament (58) were drawn upon this policy; that it is for the public interest to secure evidence of the title to a ship from her origin to the moment, in which you look back to her history; how far throughout her existence she has been *British*-built, and *British*-owned; and it is obvious, that, if, where the title arises by act of the parties, the doctrine of implied trust in this Court is to be applied, the whole policy of these Acts may be defeated; as neutrals may have interests in a ship, partly *British*-owned; and the means of enforcing the Navigation Laws depend upon knowing from time to time, who are the owners, and, whether the ship is *British*-owned, and *British*-built. Upon that the Legislature will not be content with any other evidence than the registry; and requires the great variety of things, prescribed by these Acts. They go so far as to declare, that notwithstanding any transfer, any sale, or any contract, if the purpose is not executed in the mode and form, prescribed by the

Act,

(58) Stat. 26 Geo. III, c. 60. Stat. 34 Geo. III, c. 63.

Act, it shall be void to all intents and purposes. The consequence, established by positive and repeated decisions, is, that upon a contract for the purchase of a ship, which it may be supposed, might have been executed without public mischief, though by force of that contract and by operation of Law the purchaser would be the owner in Equity from the moment of the purchase, and the vendor from that moment would be divested of all interest, yet it is decided, that these Acts are so imperative, that, if they rest upon the contract, it cannot be said of a ship, as of an estate, that by operation of Law, and by force of the contract, the ownership is changed; and if the money had been paid, the decision would be upon the same principle; and it must be recovered by another form of proceeding. There is no doubt also, that, if the person, contracting for the purchase, had taken possession and effected insurances, and afterwards brought an action upon the policy, averring, that the interest in the ship was in him, though I agree with Lord *Ellenborough* in *Robertson v. French* (59), that it is sufficient *primâ facie* to shew, that he dealt as owner, yet, if it appeared in the course of the examination of witnesses, that he was entitled only under an equitable contract, under those circumstances a Court of Law would say, the averment was not made out by the evidence.

1808.
YALLOP,
Ex parte.

In that view the case of *Camden v. Anderson* (60) appeared to me an extremely strong and weighty decision. It is clear, that in an action upon a policy of insurance a Court of Law takes notice of the doctrine of trusts; holding, that the trustee has in respect of the legal interest an insurable interest; as it was always held, that the *Cestuis que trust* has in respect of the equitable interest; and is not to be disputed, that Lord *Kenyon*, who at that

Insurable interest in a trustee in respect of the legal interest in a ship; as in the *Cestui que trust* time in respect of the equitable.

(59) 4 East, 130.

(60) 5 Term Rep. 709.

1808.

YALLOP,

Ex parte.

time presided in the Court of King's Bench, knew as well as any Judge, who ever sat in *Westminster Hall*, that previously to these Acts of Parliament, if a partnership of four had bought a ship in the names of one or two of them, or a stranger, advancing their money, they would in Equity have been the owners of that ship: yet his Lordship held clearly in that case, that, the four partners, who had agreed, that two of them should be the visible owners upon the bill of sale and the registry, declaring in that action as four joint owners, could not be heard in a Court of Justice against the positive terms of the Act of Parliament to give a representation of the title, different from that, which they had held out by the registry and the affidavits; and though, as among the four, all Equity and Justice required, that the ship, and therefore the proceeds of the policy of insurance, should be considered as partnership effects, those Plaintiffs were not permitted to recover. That has never been altered by any subsequent decision of the Court of King's Bench.

There is a wide difference between title, set up under the contrast of the parties, and under the operation of Law, or the act of God; and that is authorized by a fair construction of the Act of Parliament. Speaking of transfers, it could not be intended to apply to transfers, that could not be carried through in the mode, and by the means, prescribed: the transfer, for instance, from a testator to his executors; or the transfer to assignees in bankruptcy. The next of kin, or residuary legatees, take by operation of Law; not under a contract for transfer, capable of being carried into execution in the mode prescribed. A transfer of that description therefore is not that species of transfer, the regulation of which was in the contemplation of the Legislature: but if the transfer is of that species, which was the subject of regulation, the Legislature expects obedience from all parties, contending

contending for interests and title under such acts of transfer.

1808.

YALLOP,
Ex parte.

The argument of the joint creditors must go to this extent; that, if these partners had not purchased this interest in the ship in the name of one of themselves, a circumstance, not material, but a stranger had made the purchase, advancing the money of the partners, and they had permitted the bill of sale to be made in his name, he swearing, that he was the sole owner, and the registry being made by him as such, as the partnership advanced the money, therefore, notwithstanding all this parliamentary regulation, upon principles of public policy, with regard to the mode, in which for the benefit of the public that property was to be acquired, they are to be considered the owners; as if the subject of the contract had been an estate. That is directly inconsistent with the Act of Parliament; and if it could prevail, instead of securing the evidence, which the public was intended to have, how far the ship through every period of her existence was *British-owned*, and *British-built*, it would be the easiest thing to cover the ownership of neutrals and enemies, without a possibility of detection by means of the Act; which was intended to furnish decisive and incontrovertible evidence of those facts.

This part of the case therefore is against this claim. The creditors have no other interest than the bankrupt, as far as these Acts go. They come simply as joint creditors; not as having any lien for repairs, or necessaries, furnished to the ship; and joint creditors operate their remedies upon the equity, that partner has against partner: not by their own rights: not as having any lien by themselves; but through the equity of one partner to have a distribution. If therefore *Herbert* himself could not have claim, the creditors cannot claim under the Statute of *James* (61).

[*70]

The

(61) Stat. 21 *James* I. c. 19. s. 11.

1808.
 YALLOP,
Ex parte.

The case of *Curtis v. Perry*, though it does not rule this case, furnishes a strong intimation of my opinion, that the distinction between trusts by operation of law, unconnected with acts of the persons, claiming interests, and trusts, in a sense perhaps by operation of law, but arising out of the acts of the parties, not regulated by the Act of Parliament, is founded in principle. As that was a most important case, and the first of the class, I took a more enlarged view of it than was necessary for the decision; and with a view to the application of the principle to future cases, I entered into the consideration of the circumstances of *Chiswell's* conduct; as proving, not only, that the directions of the Act of Parliament had not been observed, but farther, that he was pressed by motives resulting from his particular situation, to take care, that the Act should not be observed; and to hold out studiously to the world, that it had not been observed; and that he was not to be considered the owner of those ships. Two principles therefore stood in his way: first, that he had broken in upon the policy of the Act of Parliament; and could not be permitted to say, he had property of this nature, not subject to the regulations of the Act; and farther, that he had done so for the purpose of defeating another law; meaning to hold himself out not to be owner of those ships; as they were bound by contracts, of which he, being a Member of Parliament, could not have the benefit. Under those circumstances it could not possibly be contended, that he had that character of owner, which for his own private and fraudulent purpose he had disclaimed. The object of * those inquiries was to ascertain, how far he had acted in that character; and the result was, that, instead of actually interposing, he anxiously withdrew from the apparent ownership.

[*71]

: Upon the first question, made by this petition, whether by the manner, in which this ship was dealt with, it is
 partnership

partnership property, my opinion is, that no such dealing in the partnership could possibly make it partnership property, as between the partners; as that would be a direct infringement of the Act of Parliament. A distinct question is, whether, though it cannot be so taken as between the partners themselves, the ship, if dealt with in that manner, ought not upon the Statute of King *James* (62) to be considered as partnership property; whether it was so held, that the joint creditors can say, it was partnership property before the bankruptcy; or, on the other hand, the title being of a public, registered, nature, that public registry must not decide, as among all mankind, where the property is. My opinion is, that the registry is the evidence of the property; and must be taken to be the evidence of it even among the creditors.

1808.
YALLOP,
Ex parte.

Upon every ground therefore this Petition must be dismissed. At the same time in this case also I shall not refuse liberty to file a Bill; if they think fit.

(62) Stat. 21 *James* I. c. 19. against the Registry. See s. 11. In *Robinson v. Macdonnell*, 5 *Maul. & Selw.* 228. and re-enacted with alterations by 6 *Geo.* IV. c. 16. *Ex parte Burn*, 1 *Jac. & Walk.* 378, *Kirkley v. Hodgson*. s. 72. Post, *Ex parte Mertin*, Vol. XIX, 491, and the note, 494.
1 *Barn. & Cres.* 588, and *Monkhouse v. Hay*, 8 *Pri.* 256, this Statute prevailed

1808.

May 3d.

Ante, Vol.

XIII, 59.

TAYLOR v. POPHAM.

MONKE v. TAYLOR.

The Order, establishing the Solicitor's lien for Costs upon the fund of assets, appropriated to the client, subject to securing a debt, from him, and the Testator as his surety, and afterwards paid by the estate of the latter, was reversed; as being inconsistent with the Decrees.

In Equity the costs are arranged according to the equities of the parties; and the Solicitor's lien is only upon the balance under that arrangement.

A PETITION was presented; praying, that the Petition, formerly presented in these causes, by the solicitors of *Robert Paris Taylor*, deceased, may be re-heard; and that the Order, pronounced by the *Lord Chancellor* (63), may be reversed.

An objection was taken, that the Order had not been drawn up; and, while it rested in minutes, the Petition could not proceed.

The *Lord Chancellor* stated, as a rule, that he could not re-hear an Order of a former *Lord Chancellor* while in minutes; but permitted the Petition to proceed; as the terms of drawing up the Order might be imposed, according to the event.

Mr. *Richards*, for the executors of *Peter Taylor*, in support of the Petition, admitting the clear right of a solicitor to receive his costs out of the money recovered, insisted, that the lien could not prevail against the appropriation,

(63) *Lord Erskine*. See the Report, ante, Vol. XIII, 50.

As to the reason of some cases at law in favor of the Attorney's lien for Costs, going the length of preventing compromise, *quære*.

Distinction, where Costs are disposed of as a subject of relief: an Appeal not open to the objection upon an Appeal for Costs only.

Order of a preceding *Lord Chancellor* not to be re-heard upon Minutes; but must first be drawn up.

appropriation, by the express Order of Lord *Thurlow* in 1791, of the fund recovered to the demand, established against the client of that solicitor by a creditor.

Mr. *Hart* and Mr. *Roupell*, for the Solicitors, in support of the Order.

The authorities upon this point carefully distinguish the solicitor from the client; and establish the equity of the solicitor, paramount that of the creditor. This balance was recovered by the exertions of these solicitors; relying upon that fund; aware, that their client was insolvent. Lord *Alvanley*'s habit was to suspend the payment of costs, with the view to excite the activity of the solicitor. That was Lord *Thurlow*'s object in suspending the payment of these costs: but the Order has had an operation beyond what was intended, and inconsistent with former authorities. The principle upon which this Order was pronounced by Lord *Erskine*, is, that even at law the attorney has an equitable right to his costs against the fund recovered, as consequential to the judgment: a right, paramount any claim of set-off, which the party, against whom the costs are awarded, may have; which may be enforced against the verdict, obtained by the party; but not to the prejudice of the attorney; whose claim attaches upon the fund, recovered by his diligence. To that extent the cases have gone; considering the costs as the property of the attorney: *Turwin v. Gibson* (64): the opinion of Lord *Mansfield* in *Wilkins v. Carmichael* (65), *Welsh v. Hoke* (66), *Mitchell v. Oldfield* (67), *Randle v. Fuller* (68), *Griffin v. Eyles* (69). A Court of Equity at least will not deal out a harder measure of justice

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TAYLOR
v.
POPHAM.
MONKE
v.
TAYLOR.

(64) 3 *Atk.* 619.

(65) *Doug.* 101.

(66) *Doug.* 226.

(67) 4 *Term Rep.* 123.

(68) 6 *Term Rep.* 456.

(69) 1 *Hen. Black.* 122.

1808.
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 TAYLOR  
 v.  
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justice to a solicitor. It is greatly to the advantage of the suitors, at large, who have not the means of prosecuting their rights, that respectable persons will undertake that duty upon the expectation of costs; and that fair and reasonable expectation is not to be impeached by a distinct, collateral, equity between the parties themselves not in question in that cause.

Another objection is; that this is a re-hearing upon costs only; which cannot be.

Mr. *Richards*, in Reply.

The cases, establishing the attorney's lien upon the debt or damages recovered, are not disputed: but, to get at that lien, the solicitor must shew a debt or damages in this Court recovered for the client; and that costs are given on that account. This Court, awarding costs, never looks to the solicitor; however meritorious his conduct; and, though he may be concerned for an executor, to or against whom costs are given. The solicitor can look only to the responsibility of his client; and, not being compelled to accept the employment, cannot complain of hardship. The question however is not upon any costs awarded. This argument might have been urged to Lord *Thurlow* in 1791; and the costs, taxed to *Robert Paris Taylor*, might have been considered as a debt, due to him: but Lord *Thurlow* then disposed of costs; considering them as part of the property of *Robert Paris Taylor*; and directed them to be appropriated to this debt, due to Lord *Holland's* estate. It cannot be represented, that Lord *Thurlow's* Order did not intend to include the amount of the costs. The subsequent Order, made in 1799, shews the contrary; directing the entire sum, including the costs, to be carried over and paid to the account of the real estate; which sum was paid accordingly; and the tenant for life of the real estate has been in receipt of the dividends, produced by that aggregate

aggregate sum. That application of the costs being thus made by those Orders, and acted upon, this claim is set up against a distinct fund, specifically directed to be applied to that debt; the claim resting merely upon the concluding words of Lord *Loughborough's* Order, which are not intelligible: "but this to be without prejudice to any application for payment of the costs of *Robert Paris Taylor* or his personal representatives."

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*The Lord CHANCELLOR.*

When this petition was formerly before me; I had a great inclination to see these solicitors paid: but I hesitated upon it; as the subject must be considered in two points of view: first, what is the doctrine of the Court as to costs, generally: secondly, what is the doctrine as to costs, where there has been a Decree. With respect to the former, it is very difficult to reconcile all the cases at law; some of which have gone to an extent, that makes a compromise between the parties impossible; others saying, that the lien shall not prevent that. The doctrine of this Court, however, has always been, that, where in a cause, comprising a great number of questions, costs may ultimately be due to both parties, and sums, to be paid as duties to each, the demands of both shall be arranged, so as to do justice between them; and the lien of the solicitor is only as to those costs, which upon the whole, taken together, one party can claim from the other (70).

Taking that however not to be so, the difficulty is, how I am to dispose of the judgment of Lord *Thurlow* in this case; standing unreversed, if it is wrong. How can that be done by Petition, or in any other way than a rehearing? That was a Decretal Order, made upon hearing the

(70) *Warrall v. Johnson*, to costs of a suit in Equity  
2*Jac. & Walk.* 214. See the and an Action at Law between  
note, post, 79. This right of the same parties: *Wright v.*  
set-off has not been extended *Mudie*, 1 *Sim. & Stu.* 266.

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the cause for farther directions; that the costs of all parties should be taxed; which is not a judgment for payment: but it proceeds to direct payment, except as to the costs of *Robert Paris Taylor*, to the respective solicitors. Is not that a negative by implication, in that stage of the cause at least, as to his costs? Those costs are then ordered to be paid to the *Accountant-General*; to be placed to the account of *Robert Paris Taylor*; but subject to farther order: the same directions are given as to other sums, arising from the sale of negroes, &c.; it is ordered, that the several sums, so directed to be placed to *Robert Paris Taylor's* account, shall be laid out in the 3 *per cents.*; then follows the declaration, that those sums shall be considered as a security to answer the debt, due to Lord *Holland*. The stock, now in question, arises from sums, received by the Receiver.

Upon many old cases there might be doubt, whether, as the demand did not specifically affect that fund, this equity could be administered. I will also give these Petitioners the benefit of the consideration, whether it was not introduced too late to be thus provided for; and there may be this hardship upon the solicitor; that he may be proceeding in the cause in this Court without the least intimation, that there can be any cross demand, resulting from the equities of the parties with regard to each other, that may affect his right to costs. At least, there is in the way this clear principle; that a Decree cannot be altered upon farther directions or by Petition. Some proceeding is necessary to set right the Decree; if it is wrong. If the declaration of the Decree, that the sums, to be placed to the account of *Robert Paris Taylor*, are to be considered as a security for the debt, due to Lord *Holland*, had stopped there, it could not be contended, that, while that debt remained unpaid, these costs not decreed to be paid to either the client or the solicitor,

but

but declared to be considered a security for that debt, with the other sums, *Robert Paris Taylor*, or his solicitor, could petition, that, though this debt remained unpaid, and that Decree stood unreversed, a sum should be paid out of Court in satisfaction of their claims for costs and for debts.

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TAYLOR.

Between the years 1791 and 1799 an Act of Parliament passed for sale of the real estate; which estate paid the debt, for which the money in Court was declared to be a security; and the Order of Lord *Rosslyn* directed the whole of the Bank Annuities to be carried over to the account of the real estate of *Peter Taylor*, in part satisfaction of the debt to the estate of Lord *Holland*. That fund, which was the object of that Order, was composed, among other sums, of these costs. Directions were given for payment of the dividends of such Bank Annuities: a Receiver was appointed of what was then due; and the sums to be received were ordered to be paid into the Bank to the account of *Robert Paris Taylor*, subject to farther Order.

If that Order had stopped there, must I not understand the *Lord Chancellor* not to mean to reverse the Decree; which he could not do in that proceeding; but to intend to act consistently with it; understanding the words, "subject to farther Order" with this qualification, "according to the directions in former Decrees and Orders?" These words however follow: "but this to be without prejudice to any application for payment of the costs of *Robert Paris Taylor* or his personal representatives."

Upon a former occasion I found it very difficult to say, what was the meaning of this; and was apprehensive, that it was to be accounted for by a feeling of hardship: but  
I must

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I must not understand it in a way, that is inconsistent with all, that the Court had done before; and how can it be consistent, except by supposing, that, if *Robert Paris Taylor* had found other means of satisfying that demand, he might have applied for his costs, and for what was due to him as a debt? At least Lord *Rosslyn's* meaning by that passage cannot be understood in a sense, inconsistent both with Lord *Thurlow's* Decree and his own. Therefore, though I much wish on account of the hardship of the case, that these costs should be paid, unless this Decree of 1791 can be displaced by some other proceeding than has been yet adopted, I am disposed to think, it is not competent to the Court to make this Order.

As to the other objection, it is clear, this is no appeal about costs. If it is considered as an appeal from Lord *Thurlow's* Order, it is not an appeal upon the question, whether costs should be given, or not; but whether, the costs having been ordered to be taxed, they were properly applied according to equity; and the rule is, that, where the costs are disposed of, as a subject of relief, though they are the subject of an appeal, it is not an appeal for costs only. The Decree of 1791 therefore might have been the subject of a re-hearing. The distinction is, that a re-hearing or appeal does not lie merely upon the point, whether costs should have been given: but it is quite competent to the party to re-hear or appeal upon such a point concerning costs as this; that the Court, having given costs, has applied the fund of the party to a payment, to which it ought not to have been applied (71).

The conclusion is, that the last Order, which I consider as if it had been drawn up, is wrong; as being an Order, made on Petition, contradicting the declaration, and varying the effect, of the Decrees, pronounced by Lord *Thurlow* and

(71) *Jenour v. Jenour*, ante, Vol. X, 562; see the note, 572.

and Lord Rosslyn. I have a strong notion, that the doctrine of this Court has all along been, that, where different demands arise in a cause, the costs should be arranged, as the equities between the parties require; without considering the solicitor (72). At law the cases in the Court of Common Pleas go much farther to permit compromise between parties than those in the Court of King's Bench; some of which go to an extent in preventing it, which I do not perfectly understand.

(72) *Ante*, 75. *Stine v.* 310, &c. 331. Solicitor's lien *Gough*, 2 *Ball & Beat.* 33. in lunacy, *Ex parte Price*, *Lang v. Webber*, 1 *Pri.* 375. 2 *Ves.* 407: and in bankruptcy, *Harmer v. Harris*, 1 *Russ.* post, *Ex parte Castle*, 530. 157. *Beames on Costs*, 204, 5, *Ex parte Bryant*, 1 *Madd.* 49.

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TAYLOR  
v.  
POPHAM:  
MONKE  
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TAYLOR.

RITCHIE v. AYLWIN.

1808.

May 4th, 5th.

THE original Bill in this cause was filed by several underwriters to have two policies of insurance: take off the delivered up; and for an injunction to restrain the Defendant from proceeding upon them. Two insufficient answers were put in; and exceptions submitted to. Upon a third answer the Master's Report, dated the 13th of February, 1808, stated, that it was sufficient as to some of the Exceptions, and insufficient as to others. On the 22d of February an Order was obtained, that the Plaintiff should be at liberty to amend without costs; and that the Defendant should answer the Amendments and Exceptions at the same time. The Bill was amended accordingly; and to the amended Bill a plea was put in; alleging, that the Bill was for several distinct matters; and that the interests of the Plaintiffs were distinct.

Motion to File for irregularity a Plea to a bill, amended under the usual Order, after Exceptions allowed, refused; as a case for a Plea may arise either from the amendments themselves, or from their effect upon the original part of the bill.

A Motion was made by the Plaintiffs, that the plea should be taken off the File for irregularity.

Mr.



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Mr. *Bell*, in support of the Motion.

This is a plea of multifariousness to the whole Bill, after answer to part, and Exceptions allowed. After Exceptions allowed, and the usual Order to answer Amendments and Exceptions together, the Defendant cannot put in a plea only. The Court will, as in the late case of *Partridge v. Haycraft* (73), look at the Amendments and the Exceptions as distinct; and he cannot by the same plea cover both.

Sir *Samuel Romilly*, and Mr. *William Agar*, for the Defendant.

After a full answer to all, that was contained in the original Bill, long Amendments being introduced, in that state of the record the Defendant is entitled to plead. The Court cannot look at the original Bill; which the Plaintiffs have withdrawn altogether; and must consider this plea, standing upon the record, as it has been perfected by the Plaintiffs themselves: the old record being completely defaced. The amended Bill stands altogether as an original Bill. It is not necessary, that it should contain a word of the original Bill. The consequence of refusing to permit a Defendant to plead to an amended Bill is, that a Plaintiff may by contrivance, after answer, altering the Bill altogether by Amendment, deprive the Defendant entirely of that species of defence; and in a case, requiring upon all the principles of the Court, that he should have the benefit of it. Amendments may be put upon the record; charging the Defendant with acts, which would subject him to penalties: gaming transactions; upon which ground in the late case of *Law v. Nelthorpe* it was held, that a demurrer to an amended Bill is good. The case may be put of Amendments, after answer; those Amendments bringing forward the case of an incestuous marriage of the Defendant; facts, entirely suppressed

suppressed in the original bill ; as it is not necessary, that the amended bill should contain any thing, that was in the original bill : could the objection to a plea by the Defendant having answered the original bill, be maintained in such a case ? In the case in *Mosely* (74) it was held, that a plea cannot be suppressed on motion ; though that was a very favourable case for it.

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*Mr. Bell*, in Reply.

It is not necessary to contend, that in no instance a plea can be put in to an amended bill. The proposition is, that the Defendant may select parts of the bill, introduced by amendment : and may plead to those parts : but, if he can do that, he cannot, after answer filed, still less after exceptions allowed, put in a plea to cover the whole bill, then upon the record. Can the Court dismiss the bill ; though there is an answer upon the record, not disposed of ? The answer must be looked at together with the plea. If, as is represented, amendments may be introduced, so as to make an entirely new bill, the Defendant may cover every part of the amendment by a plea ; and the question will then fairly arise, whether the plea is over-ruled. The question upon this occasion is, whether a plea can be put in to the whole record ; including what has been answered ; and covering the exceptions, as well as the amendments. There is no instance of a plea after submitting to answer. •

*The Lord Chancellor.*

This is quite a new point of practice. The Plaintiffs have taken the right course to avail themselves of the objection, if it is an objection, to this plea, by moving, that it shall be taken off the file for irregularity ; as in order

(74) *Mos.* 207.

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 v.
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A Plea must
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order to decide upon the worth of the plea, it must be argued. The case in *Mosely* (75) is a very strong proof of that; upon a second plea for want of parties; and, though that was as plain a case for acting promptly as can be imagined, it was held, that the plea must be argued. I am not only not at liberty to go into the worth of the plea upon this motion, but I must consider it for this purpose, as a good plea. I will take it upon this occasion, that the bill, as originally filed, was not open to a plea. It is true, that a plea must reduce the defence to a single point; with the qualification, that this point may consist of a variety of facts; and that those facts should be upon the record as soon as may be. If the Plaintiff has a case, which is open to a plea, but the bill being such as not to admit of a plea, the Defendant does not plead, when he first meets the cause, that is to be attributed, not to him, but to the Plaintiff. If the Defendant answers, and the answer is sufficient, and the Plaintiff then moves to amend, and by his amendment changes the whole character of the bill; so that, as amended, it is open to a plea, consider the hardship, that may follow from confining the plea to the amendments. In most cases the Plaintiff may, if he pleases, put his whole case upon the record: he does not do so; and, having to the bill, thus shortly framed, obtained an answer, he may by amendment give a different character to the original parts of the bill: so different, that, if that character had been given to those parts of the bill, when originally filed, which the charges, founded upon them, borrow from the amendments, the Defendant might have protected himself by a plea. It is not his fault, that he has so answered: the Plaintiff compelled him so to answer: he could not protect himself from answering so; and the argument, distinguishing this, as a case, in which the

the Defendant has submitted to answer the original bill, falls into this statement; that, if the Defendant pleads to the amendments, the Court must consider, whether that plea to the amendments is not over-ruled by the answer, though it may be clear, that, if those amendments had stood part of the original bill, the very facts, to which the answer applied, would have been so qualified, that the Plaintiff could not have had an answer even to that part of the bill, with regard to which he contends, that the answer bars a plea.

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The objection however goes much farther than that. I can easily conceive the case of an insufficient answer, reported insufficient; and then the usual motion for leave to amend; and that the Defendant shall answer the amendments and exceptions together. The Plaintiff may amend, so as to strike out every thing, to which the answer referred; and there is then left upon the record an answer to a bill *in Nubibus*: a bill, not existing: or, at least, in which may be left every charge, to which the answer is insufficient; and introduced by amendment facts, perhaps calling for a discovery, that would implicate the Defendant in criminality. Can it be contended in such a case, that the Defendant is not at liberty to plead? The effect of the practice either way must be hard. Upon the motion for leave to amend, and that the Defendant shall answer the amendments and exceptions together, the Court must either require the Plaintiff to declare his amendments, or understand him to pledge himself, that the amendments and exceptions shall be in furtherance of the original cause; and not a new one: or the Defendant must have liberty to plead, or in some way to apply to the Court to restrain the Plaintiff from keeping upon the record a case of so much hardship as some of those, to which I have alluded.

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My opinion therefore is, that topics have appeared in the argument of this motion, which shew, that the best way of examining whether this plea ought to be admitted; is by hearing it argued; and for that the case in *Mosley* (76) is a strong authority. How can the difficulty be got over from the case of amendments, after exceptions allowed, striking out every part of the bill, to which the answer applies; leaving upon the record an answer, without any bill, to which it can refer?

For the Plaintiff.

It has been considered in practice, that the Defendant is concluded from pleading; unless he confines his plea to such parts of the bill as are not answered; or, that it should be allowed upon special application to the Court.

The Lord CHANCELLOR.

Is there any instance of such an application? That would relieve much of the inconvenience: but I do not recollect any application in such a case for leave to plead. It is now admitted, that the Defendant, under those circumstances must in some way be set right: then it must be considered, what would be the most convenient rule in a case, not the simple case, that I have put, but of great complication. If, for instance, the Court is to examine, whether the plea to the amendments would be over-ruled by the answer, it must be stated to the Court, what was the original Bill: the answer: the first amended bill: the answer to that: the second amended bill; and so on; and what is proposed as the subject of the plea; and it must be determined upon the representation at the bar as to the effect of that plea, with reference to the answer, as
 [*85] * answering or not, some of the charges, covered by the plea. That course would not be so conducive to justice,

or-

(76) *Mos.* 207.

or so convenient to the suitors ; as the result could not be collected as effectually upon that application, as upon argument of the plea itself.

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v.
AYLWIN.

The Plaintiff's Counsel admitting, there was no instance of the special application to the Court, which he had suggested, the Motion was refused.

The ATTORNEY GENERAL v. FOWLER.

1808.
March 29th.
April 27th.
May 7th.

UNDER an Information and Bill, filed by ten out of twelve lessees in trust of a Protestant Dissenting Chapel at *Edmonton* against the two others, a Motion was made for an Injunction to restrain the Defendants from receiving the pew-rents, and for the appointment of a receiver.

A Protestant Dissenting Chapel may be the subject of an Information by the *Attorney-General*, as a Charitable Institution.

Mr. *Hart* and Mr. *Bell*, in support of the Motion.

The jurisdiction is clear, within the distinction in *The Attorney General v. Parker* (77), and *The Attorney General v. Egster* (78). The suit was instituted upon the public right to sue by the *Attorney General*, at the relation of persons, participating in that right, and upon the private right of these trustees. Every institution for * the purpose of performing the offices of religion for the public, gratuitously, is an institution of a public nature, which

[*86]

(77) 3 *Atk.* 575. 1 *Ves.* *Attorney General v. Newcombe*, XIV, 1. See the 43.
(78) *Ante*, Vol. X, 335. note, X, 347.

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which this Court will protect. All these institutions subsist under the express toleration of the Legislature, that they shall be open; and that all persons, who choose, shall be at liberty to attend gratuitously. In that respect this is a public institution, falling within the description of a Charity; as understood in this Court. The private right is with reference to the accommodation of the subscribers: the pews and seats being hired by individuals; who are merely the tenants: the right as to that being vested in the trustees; who receive the rents; and apply them to the support of the minister and the different officers, to repairs, and other objects of the trust.

*Sir Samuel Romilly*, and *Mr. Cooke*, for the Defendants.

This cannot be represented as a Charity in any respect. To the description of a Charity, in the enlarged sense of this Court, two qualities are attached: 1st, it must be a public benefit: 2dly, it must be gratuitous. This is merely a private subscription for the convenience of the individual subscribers: partaking of the nature of a Charity no more than a voluntary subscription for any other purpose; as a library; of which they were to have the common use. If a sum of money should be bequeathed to purchase a library for the public benefit, that would fall within the description of Charity: but an institution by voluntary subscription for the education of the subscribers has nothing in it of that nature.

Then, as far as this is a Bill, there is a defect of parties. It is not necessary, that every subscriber should be a party: but the persons beneficially interested should be parties in some way; and a suit, instituted by some trustees against others, not one of the *Cestuis que trust* being before the Court, cannot be entertained. Of the ten  
 Plaintiffs

Plaintiffs only two continue members of this congregation: the other eight having withdrawn. If, however, the jurisdiction can be maintained in this case, there is no ground for appointing a receiver; for which purpose the apprehension of irreparable, or, at least, great mischief is necessary. Much inconvenience will follow such an appointment. How is the Order to be enforced: the greater part of the revenue arising from voluntary subscription, blended with the pew-rents.

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The  
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*The Lord* CHANCELLOR.

This is an application, not only to restrain the Defendants from receiving these pew-rents, but also, that a receiver may be appointed; and the first objection is, that this is not property given to a charitable use; so that the *Attorney General* can by Information maintain a suit. On the other hand it is insisted, that the suit is instituted, not only upon an Information, but upon an Information and Bill; and, if the Court cannot proceed upon the Information by the *Attorney General*, it may upon the Bill. The objection, taken to the record, considered as a Bill, as well as an Information, is, that the individuals, in respect of whose interests the suit is instituted, are not, either collectively, or some suing for themselves and the others, yet made parties; and therefore the Court is not at liberty to interpose; and it is farther contended, that cases of very pressing inconvenience may arise, if the Court should interpose; as it is desired. In that and the other views of this case I have considered it with anxiety; and it strikes me, that there will be a degree of inconvenience from the interposition of this Court, that will be exceedingly detrimental to the objects of the parties: if however, that interposition is due, and is desired, the inconvenience, whatever may be its amount, is not a ground for refusing a Receiver.

May 7th.

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This



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This property is held by lease upon certain trusts, of such a nature, that, though they are for the benefit of a dissenting congregation, it cannot be denied, that they are a congregation of persons, whom the Law will protect; and in whose favour a trust will be enforced: the nature of their worship being such as entitles them to protection; and there are abundant authorities, that, if this had been either a devise or a gift for this purpose, independent of the Statute of *George II* (79), it would constitute a Charitable Use; and, as such, would be protected and enforced in this Court (80).

With respect to the inconvenience, that may be expected from appointing a Receiver, this congregation consists of persons, whose opinion is, that the best mode of securing the due performance of Divine Worship is by electing a minister, and appropriating to his support the rents of certain pews; and farther rewarding him by voluntary contribution from time to time. It is admitted, that the interposition of this Court cannot possibly go to the extent, that these contributions, purely voluntary, upon the part of the persons attending this chapel, which may be due from the best and most interesting considerations, can be handed over to any receiver. No person has that, which the Law requires, as an interest, in those voluntary contributions; the amount, receipt, and application of which depends altogether upon the individuals, who may be inclined to make the donation (81),

It is then said, that the lessees under this instrument have taken upon themselves a trust to let the pews; and the

(79) Stat. 9 *Geo. II*, c. 36. 3 *Mer.* 353. *Foley v. Wont-*

(80) Post, *The Attorney General v. Wansay*, 231. *Davis v. Jenkins*, 3 *Ves. & Bea.* 151. *Attorney General v.* 1824.

Lord Dudley, Coop. 146. *Attorney General v. Pearson*, 6 *Pri.* 214.

the rents arising from them are also to be applied upon the trusts of this deed, as well as the voluntary contributions. To any person, acquainted with societies, associated upon these principles, the mischief must be obvious, that will follow the interposition of this Court by appointing a receiver of these pew-rents; which are generally paid by persons, who are also the individuals, making the voluntary contribution; and who frequently make that contribution in some degree in the payment of those pew-rents. If by granting a receiver I sever the title to receive the pew-rents from the voluntary contributions, I may affect that fund, in which the trustees and others may be represented to as having an interest, which the Court will acknowledge, and endeavour to protect; and by the means, intended for its protection, I may destroy it. On the other hand, if there is an obligation to pay those rents, and these persons think proper to require the performance of the trust, and the rents are to be applied to certain defined purposes, in respect of which the trustees are answerable, there may be cases, in which the Court cannot refuse to interpose; though the funds themselves may thereby be put in peril.

This view of the case strikes me in this stage; as, admitting, that a Bill might be filed, which would call upon the Court to decide, whether a receiver should be appointed, and this restraint as to the pew-rents imposed, or not, the question, if likely to introduce mischief to this society, and peril to their funds, taking the objection for want of parties to be well founded, would be a question rather of time than merits; as, when the proper parties should be added, the Court must interpose upon the record, so changed. I am not inclined to go much farther than to intimate this opinion; that, if it is admitted, that, individuals purchasing the lease of the premises, and assigning it to trustees for the purposes of such

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such a meeting-house, or a person, entitled to the premises for a term of years, bequeathing them to trustees, independent of the Statute (82), that assignment or bequest would constitute property, which the Court would be bound to consider devoted to charity, and to deal with as such, and the case before me being only, that ten or twelve persons have become lessees, engaging in stipulations, that form the consideration on their part for the purchase of this lease, and voluntarily imposing upon themselves the execution of the trust for charitable purposes, it would be difficult to contend, that they are not purchasers, giving this property to the trusts and uses of the deed. I do not wish to go farther; feeling, that the exercise of this jurisdiction in a mode, that will hazard the existence of the object, will not be judicious: but, if the Bill should be amended, as a Bill, or if this is to be taken as a gift by the lessees, as purchasers of the lease, giving it to charitable purposes, I feel, that I should be obliged to execute it.

The best course therefore will be to let this Motion stand over; and to impress upon these parties the weighty consideration, whether it is not better to compose their temporal differences; which cannot subsist without great hazard to their religious concerns; and to endeavour at least to settle their disputes without calling upon this Court to interpose its jurisdiction.

(82) Stat. 9 Geo. II. c. 36.

— v. LINDSEY.

1808.

May 8th.

**A** MOTION was made for the appointment of a Receiver upon an estate in the *East Indies*.

Appointment of a Receiver of an estate in *India*.

*The Lord CHANCELLOR*, granting the Motion, said, the rents should be remitted to some person in *England*; who may pay them into the Bank.

The Receiver to be in *England*; acting by an Agent.

Sir *Samuel Romilly*, in support of the Motion, suggested, that, as a Receiver in *India* would be out of the jurisdiction, some person in this country should be the Receiver; who might appoint his own agent in *India*.

Inquiry directed, what should be the Term, beyond which he should not be

*The Lord CHANCELLOR* approved that course; and said, there must be some provision to prevent the necessity of applying to the Court from time to time for permission to let.

permitted to let.

A Reference was accordingly directed to the Master to inquire, what should be the Term, beyond which the Receiver should not be permitted to let.

1808.

Feb. 1st.

May 9th.

LEIGH v. LEIGH.

THE LORD CHANCELLOR.

THOMPSON, *Baron*.LAWRENCE, *Justice*.

Devise to the Devisor's sister A., then unmarried, for life; with remainders to her first and other sons in tail male; to her daughters in tail, as tenants in common; to his sister B., then married, for life, and to her first and other sons in tail: remainder to the first and nearest of his kindred being male and of his name and

THE Bill in this cause stated the Will of Lord *Leigh*, dated the 11th of *May*, 1767; devising all his estates, subject as to part to a term of five hundred years, to his sister *Mary Leigh* for her life; with remainder to her first and other sons in tail male; remainder to her daughters in tail general, as tenants in common; remainder to his sister *Ann Hachet* for her life; remainder to her first and other sons in tail; with a limitation in remainder in these words: "Unto the first and nearest of my kindred being male and of my name and blood that shall be living at the determination of the several estates herein before devised and to the heirs of his body lawfully begotten."

The Bill farther stated the death of Lord *Leigh* in the year 1786, and of *Mary Leigh* in *June*, 1806, without issue: *Ann Hachet* having died in her life-time without issue; and that at the time of the death of Mrs. *Leigh* the Plaintiff was and is the first and nearest of kindred, being male, of the name and blood of the testator, living blood, that shall be living at the determination of the estates before devised, and to the heirs of his body.

A person, claiming under the last limitation, must be of the name, as well as the blood; and the qualification as to the name is not satisfied by having the name, taken by the King's License, previous to the determination of the preceding estates.

living at the death of the said *Mary Leigh*; and that, being the son of *John Smith*, Esq. he had on the 8th of *April*, 1802, obtained his Majesty's License, that he and his issue might assume and take and use the surname of *Leigh*, instead of that of *Smith*, which surname of *Leigh* he has ever since assumed, taken and used.

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The Bill prayed an account of the rents and profits of the estates, formerly belonging to Lord *Leigh*, and comprised in the term of five hundred years, and that the trustee of the term may assign it to the Plaintiff; and deliver up to him all deeds and writings respecting it.

To this bill a Demurrer was put in.

Sir *Samuel Romilly*, Mr. *Trower*, and Mr. *East*, in support of the Demurrer.

The Plaintiff claims as the first and nearest of kindred, being male, of the name and blood of the testator Lord *Leigh*, living at the death of his sister *Mary Leigh*; and the only question is, whether the Plaintiff is entitled under the last limitation in the Will of Lord *Leigh*; or is upon the statement of his bill a mere stranger, without interest in these estates. The demurrer is in substance, that the Plaintiff has shewn no title to relief in equity; and this is a mere question of intention. The Plaintiff must shew, that he answers every part of this description. The intention of the testator must have been, that his estates should go, either to the person, most nearly related to him, being male, and who had the name of *Leigh* by inheritance; or he must have had the object, for the purpose of preserving the name, that the estates should go to a person of that name. No anxiety appears in any part of this Will to perpetuate the name; and it appears

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pears clearly, that he had no such desire, from the previous limitations to his two sisters, and their issue; and the circumstance of the name is only introduced upon the improbable event, that both his sisters might die without issue: both being then young; and one of them married. The estates also are limited expressly even to the daughters of Mrs. *Leigh*. His intention therefore was to mark, as he has with great anxiety, his nearest relation of the male line; that person also having the name of *Leigh* by inheritance, not by purchase.

The statement of this bill, that the Plaintiff's name was *Smith*, is equivalent to stating, that he is a relation in the female line. In *Bon v. Smith* (83) under a devise to the next of his name it was held, that a married daughter could not take. *Jobson's Case* (84) is to the same effect. In *Counder v. Clarke* (85). *A.* had issue a son and a daughter: the daughter married; and had issue two daughters. *A.* devised to his son, but, if he die without issue, "to my right heirs of my name and "posterity:" the son being dead without issue, it was held, that the land should not go to the uncle; for, though of his name, he is not heir; for the issue of the daughter is heir.

The result of those authorities is, that the party must answer both parts of the description. In *Barlow v. Bateman* (86) the House of Lords determined upon the intention, that the daughter should marry a person, entitled by birth to the name and arms of the family; not one, who had assumed them. Lord *Hardwicke* in *Pyot v. Pyot*

(83) *Cro. Eliz.* 532.

Hale's MSS. Co. Lit. 24 b.

(84) *Cro. Eliz.* 576.

note 145.

(85) *Hob.* 29. *Moor*, 860.

(86) 3 *P. Will.* 65. 4 *Bro.*

1 *Brownl.* 129. Stated by

P. C. 194.

Mr. *Hargrave* from Lord

v. *Pyot* (87) expresses the same opinion; referring to that case with approbation; and puts the very case now before the Court (88): "If it refers to the name, suppose "a person of nearer relation than any of those now "before the Court, but originally of another name, "changing, it to *Pyot* by Act of Parliament: that would "not come within the description of nearest relation of "the name of *Pyot*; for that would be the contrary to "the intention of the testatrix; and yet that description "is answered; being of the name of *Pyot* and perhaps "nearer in blood than the rest." It is not probable, that the testator should intend, that the name should be assumed in this way; which might afterwards be relinquished. A name, taken with the view, as Lord *Hardwicke* expresses it, to a scramble for an estate, is in some degree a fraud upon the testator's intention. *Pyot* v. *Pyot* (89) is a case of a mixed nature; and the argument, as to real estate, that the description is to be confined to the first and nearest in course of descent, was inapplicable to personal property: but as the real estate was involved with the personal, the construction, applicable to the latter, was applied to the real estate: the Will as to the personal estate, which could not be taken from them, furnishing the rule as to the real: but Lord *Hardwicke*, contemplating the circumstance of a person, assuming the name for the purpose of entitling himself to the testator's bounty, puts almost in precise terms this case; and declares, that the assumption of the name by Act of Parliament for that purpose would not do. In *Barlow* v. *Bateman* (90) the condition was to marry any person of the name of *Barlow*; not, as in this Will, looking to any particular line of descent. There was a ground

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(87) 1 *Ves.* 335.(88) 1 *Ves.* 338.(89) 1 *Ves.* 335.(90) 3 *P. Will.* 65. 4 *Bro. P. C.* 194.

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ground therefore for the opinion of the *Master of the Rolls*.

This rule is laid down by Lord Chief Justice *Willes*, that the intent of the testator ought always to be taken, as things stood at the time of making his Will, and not to be collected from subsequent accidents; which the testator could not then foresee (91). This testator's preference of the male line of his family, as in *Chapman's Case* (92), is evident: but he does not sacrifice to that object his sisters; who had immediate claims upon him.

*The Lord Chancellor.*

The Plaintiff's argument must admit, that, if Mrs. *Hatch* had a daughter, and that daughter had a son, that son, taking the name of *Leigh* by his Majesty's Licence, would have excluded all the males.

For the Demurrer.

The fair conclusion is, that the testator meant a person in the male line by patronimic descent; and could not mean any remote descendant in the female line; overlooking those, who were nearer. He might think it right, that an estate, descended for ages in the paternal line, should not go to the maternal line; deviating from that course only in favor of the immediate object, his sisters, and their families. Upon several authorities, "blood" is included in "kindred:" by the subsequent use of the word "blood" therefore the testator must be taken to mean something more: viz. "name by blood;" and some effect must be given to every word; if that can be. That this is the true etymology and sense appears  
in

(91) *Willes*, 297. *Doe, on dem. of Morris v. Underdown.* (92) *Dy.* 333 b.

in *Sir Moyle Finch's Case* (93): "*Cognomen Majorum est ex Sanguine tractum*" (94). The name therefore under this Will must be the name by blood: not a name, assumed afterwards merely to answer this particular purpose; and the Plaintiff both under the authorities and the intention does not answer the description.

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v.  
LEIGH.

Mr. *Richards*, Mr. *Leach*, and Mr. *William Agar*,  
for the Plaintiff.

If the paternal line is to be considered as the testator's object, it does not, upon this record, follow, that the Plaintiff has not descended through his mother from the family of *Leigh*. In the first devise the testator certainly does not affect any care about the name of *Leigh*. He passes by the daughters of his second sister; and prefers the person, answering the subsequent description; whoever he may be; perhaps a collateral relation very distant. The question comes to this; whether this Plaintiff is not to be considered as the devisee; appearing at this, the given time, with the name; though previously to the year 1802 he bore the name of *Smith*. Upon this argument it must be admitted, that he answers all the other requisites; and it is too much upon this Will, devising to a person, who might be a very remote relation, to the exclusion of the daughters of the testator's sister, to conclude, that he had a predilection for persons of the name of *Leigh*, merely on that account. The construction must be upon the Will itself; not upon supposed cases, never contemplated by the testator.

In *Barlow v. Bateman* (95) the opinion of Sir *Joseph Jekyll*, that even a voluntary assumption of the name, without licence, would do, and his reasoning upon the subject of surnames, are strong in this Plaintiff's favor; and the Reversal of the Decree does not form an objection.

[ \*98 ]

(93) 6 Co. 63.

(95) 3 P. Will. 65. 4 Bro.

(94) 6 Co. 65.

P. C. 194.

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jection. It must be recollected, that the prerogative to grant arms, an important appendage to the surname of a family, yet subsists; and the Court of Chivalry is still in existence. No person by his own authority can assume arms. A person, bearing arms, must necessarily be of that family, whose arms he bears. In that case the arms could not, as the name might, be assumed: that person therefore could not answer the description in the most important respect; as a man of the family of *Barlow*, having, not only the name, but the arms also, was intended.

This Plaintiff has by that authority had the name of *Leigh* ever since the year 1802: he is also of the blood, and the first and nearest kindred of the name and blood. He must admit, as your Lordship has observed, that if a daughter of Mrs. *Hachet* had a son, that son, having assumed the name of *Leigh*, would have answered the description; and must have had the preference: but, the Plaintiff being the person, who answers the description, the circumstance, that another person might have come into existence, and might have had a preferable title, cannot form an objection. What is the meaning of a surname by birth? It is acquired only by usage; and may be abandoned. The Court is desired to introduce into this limitation these words "by course of patronimic descent." Words in a Will are to be understood according to their plain and sensible import; unless that sense would give an irrational intention; or is controuled by a clear intention, collected from other parts of the Will. This testator seems to have had two objects: to perpetuate the estate in his name; and that it should be so perpetuated by the first and nearest of his kindred. He uses the term "*name*" generally; which must be \* understood, by whatever means acquired. That construction, which advances both the objects, is the most sensible. If the testator had left a niece, who had a son,

is

is the inference irrational, that, if this object would have been promoted by that son's taking the name, the testator should have intended to prefer that son to a very remote relation? The construction, contended by this demurrer, must exclude that case. Although words may be added in a Will, or qualified, from the plain intention, collected from other parts, plain words cannot be controlled by conjecture. Is the argument irrational, that the testator intended, not to impose the condition upon a near relation, a grandson of his sister Mrs. *Hachet*, for instance, according to the case put by your Lordship, but that it should be annexed to the limitation in favour of a more remote relation? Why should he prefer the male line, except to perpetuate the name? Most of the authorities, which have been cited, are upon the general construction of the word "name." Lord *Hardwicke's* construction in *Pyot v. Pyot* (96), that it was not necessary, that the claimants should be of the name of *Pyot*, according to the description of the Will, if they were of the stock, appears extraordinary.

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LAWRENCE, *Justice*.

According to a manuscript note of that case, which I have, the bequest was "to my nearest relation of "the name," not "of *Pyot*," but "of the *Pyots*;" and that circumstance appears to weigh with Lord *Hardwicke* (97).

For the Plaintiff.

That makes it consistent; and a clear authority for this Plaintiff; who was not necessarily to have the name of '*Leigh*;' the limitation, not being to a person, bearing that name, is satisfied by a person, sprung from his name and blood.

[ \* 100 ]

In

(96) 1 *Ves.* 335.

says, that the words "of the

(97) 1 *Ves.* 338. Mr. *Belt*,

name" are not in the *Regis-*

in his *Supplement*, page 161, *ter's Book*.

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In *Sheppard's Touchstone* (98) several cases are put as to the meaning of the word "nearest."

In *Barlow v. Bateman* (99) the only reason, stated in the Appeal, is, that the Respondent could not assume the name legally, otherwise than by Act of Parliament. This Plaintiff has legally assumed the name, by the King's license. The question is, not, whether that assumption is voluntary; as it is in either case; but, whether it is legal: and this mode, by the King's license, is the daily course. A name can legally be assumed only by one of these two modes; which are mentioned by Lord *Mansfield* in *Gulliver v. Ashby* (100). Suppose the branch, which the testator was supposed to prefer, had changed the name of *Leigh*; and acquired another, by the King's licence.

*The Lord CHANCELLOR.*

A person, taking a name by Act of Parliament, does not lose his original name; and might take a legacy by it. The effect of the King's license is only permission to use a name: not imposing it.

In that case he would not have lost the other name. An Act of Parliament, giving a new name, does not take away the former name: a legacy given by that name, might be taken. In most of the Acts of Parliament for this purpose, there is a special proviso to prevent the loss of the former name. The King's license is nothing more than permission to take the name; and does not give it. A name, therefore, taken in that way, is by voluntary assumption (1).

For

(98) Page 436.

(99) 3 *P. Will.* 65. 4 *Bro. P. C.* 194.

(100) 4 *Bur.* 1929; see 1940.

(1) In *Doe, on the demise of Luscombe v. Yates*, 5 *Barn. & Ald.* 544, the voluntary assumption of a name was held sufficient to prevent a For-

feiture; though the farther direction, to procure within a limited time an Act of Parliament, or other sufficient authority, had not been followed; that term upon the construction of the Devises not being imperative.

For the Plaintiff.

The person who answers the description, when the contingency happens, is to take. The Plaintiff is therefore entitled, as having the name, acquired legally, at that time, and no other name; and the Court will not strain in favour of a much more remote relation.

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Sir Samuel Romilly, in Reply.

The proposition, advanced by the demurrer is, that, taking the whole of this Will together, the testator intended a person, who is of his name, as being of his blood; answering also the other parts of the description; every part of which points to connection with him and his family. It would be difficult to express the idea he had by other words: it could not be done by merely inserting the words "by descent;" though for convenience used in the argument; as strictly a man cannot be said to have a name by descent; taking nothing by descent until the death of the ancestor. The testator must have intended, either a person having his name, as being of his blood, as connected with him; or, that the person, enjoying his estate, should have the name; and the latter construction is excluded by shewing, that he had no such anxiety, that the name and the estate should go together. The object, attributed to him, not to impose this condition of taking the name upon such near relations as his sisters, or their immediate issue, but to shackle the estate of a more remote descendant, is absurd. An object so extraordinary, it is to be presumed, would have been secured by an express condition. Upon the whole Will no other intention can be attributed to him than to express a person having the name by blood: that is, as being of the blood.

The case of *Barlow v. Bateman* (2) is a direct authority;

(2) 3 P. Will. 65. 4 Bro. P. C. 194.

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riety; and a much stronger case than this. By the extract from the Will, in Mr. Cox's note, and according to the printed case in the House of Lords, it appears, that nothing about the arms was expressed. The assumption of a name by Act of Parliament is as much a voluntary act as by the King's licence, or without any authority. The King's licence merely gives permission to the party to use the name, if he thinks proper: not imposing upon him the necessity of taking it; and, the bill states, that the Plaintiff assumed the name of *Leigh* instead of that of *Smith*. What would have been the offence of not using the former? A name by Act of Parliament, with the express injunction to use that name *only*, would form a case of considerable difficulty; and probably the party, being restrained from taking the name, would not be entitled to the estate. The case of *Pyot v. Pyot* (3), with the explanation, that has been given, is very intelligible.

May 9th.

LAWRENCE, *Justice*, having stated the case, delivered the following opinion:

The demurrer to this bill, admitting the facts, stated in it, has raised the questions; upon which your Lordship has been pleased to call upon us for our assistance; which were, whether it be not necessary, that the person, entitled under the devise in question, should be both of the blood and name of the testator; and, if it be, whether the being of his name is satisfied by the Plaintiff's having assumed the name of *Leigh* by his Majesty's licence; in answering which the only inquiry to be made is, what was the intent of the testator; and whom did he mean to describe by the words he has used.

Though

Though the Plaintiff, by taking the name of *Leigh*, may have brought himself within the letter of the Will, yet the demurrer does not admit, as was said in argument, that he answers the description in the Will; for that will depend on whether the Plaintiff comes within the meaning of the words; as they have been used by the testator; and, though it be true, that, if that meaning be ascertained, no reasoning from supposed cases can induce the Court to put a different construction upon the Will, but can only lead to a conclusion, that the testator did not see all the consequences of the disposition, he may have made, yet in endeavouring to ascertain the meaning of a testator, the absurdities, improbabilities, and inconsistencies, which may arise out of cases, falling within one construction, or another, have constantly been attended to, with a view of ascertaining such meaning.

In the course of the argument it was stated at the Bar, and I think justly, that the testator in requiring the remainder-man to be of his name could only have one of two objects in his view: viz. either that of continuing his estate in the name of *Leigh* from attachment to it, by inducing those, who from time to time might answer the other descriptions in his Will, to assume that name, and thereby to complete in themselves the whole description, which he willed the remainder-man should answer; or else, that of adding to the circumstances, he had before required of the remainder-man, a farther character, independent of any act of his own: and which could only belong to him in consequence of his descent from the same stock with the testator; with a view of excluding all of that stock, who might not have that additional character belonging to them.

In order to ascertain, whether the first of these two objects was that, which the testator had in his view, the situation

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If the meaning of a Will is ascertained, reasoning from supposed cases will not induce the Court to make a different construction; but can only lead to a conclusion, that the Testator did not see all the consequences: but the absurdities, improbabilities, and inconsistencies, which may arise out of cases, falling within one construction or another, are attended to, with a view of ascertaining the meaning.

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situation and circumstances of his family at the time of making his Will have great weight. He does not appear to have had any very near relations but his two sisters; for how near a cousin, Mr. *Craven* was, does not appear; one of his sisters was single; and the other married to a gentleman of the name of *Hachet*. These sisters in different degrees were the immediate objects of his bounty; and were with their children the only persons, whom in the disposition of his real estates he can be said to have distinctly contemplated. To his sisters he gave estates for life, and to the sons and daughters of the one and the sons of the other he gave estates tail, without any reference whatever to his own name.

From these limitations in his Will it has been argued, and I think truly, that his requiring the name of *Leigh* of the remainder-man could not proceed from any anxiety about the continuance of his name; as such anxiety is perfectly inconsistent with a disposition, which, if his estate followed the first limitations of his Will, in the family of either of his sisters, (as at the time of making his Will it was likely to do) would occasion an immediate disuse of his name during the lives of both his sisters; if the single one should marry: (an event he certainly contemplated); and during the lives of the issue male and female of the one, and of the issue male of the other; if they should have such issue; and a disuse of the name for ever; if the remainder in question should be barred by any of those, to whom the estate was limited in tail. Had an attachment to his name been his motive, the natural thing for the testator to have required would have been the continued and uninterrupted use of it by all those, to whom he had limited his estate; and his not requiring it of his sisters and their issue, but expecting it from a remote remainder-man, is not, I think, satisfactorily accounted for, from a supposition, that they would have felt the

the value of the limitations in their favor lessened by their being called on to bear the name of their ancestors; and the extinction of the name for generations, and possibly for ever, is not to be reconciled with any solicitude in the testator to preserve it; and therefore an attachment to his name does not appear to me the reason of his requiring the remainder-man to be of that name.

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Another circumstance, from whence the same inference may be drawn, is that of the testator not having taken the usual and proper steps to provide, that the first and nearest of his kindred should be of the name of *Leigh*; by making it a condition, that he should assume the name, if at the determination of the prior estates he did not bear it; for, whether the remainder-man must have all the enumerated qualifications to be entitled, or whether he may be entitled, though he be not the first and nearest of the testator's kindred, being male, provided he be the first and nearest of the name, the consequence of not taking such steps might be, that the remainder might be entirely defeated; or the estate go to one, not the first and nearest; without any default in him, who might be the first and nearest of the testator's kindred; for, if all the enumerated circumstances must unite, an infant of a day old, who united in himself every part of the description, but that of the name, and, on account of his recent birth, could not assume the name, would by his birth prevent the remainder vesting in any other; and, if the terms of the limitation would carry the estate to the first and nearest, who at the determination of the prior estate might by assumption bear the name, an infant of the description I have mentioned would lose the estate, without any default whatever, by one more remote taking the name; and that surely could not be meant by the testator.

Another

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Another consequence would also follow from the construction contended for by the Plaintiff: viz. that during the continuance of the prior estates, which might have lasted for several generations, every one, who was first and nearest of kin to the testator, being male, not bearing the testator's name, must have, from time to time, assumed the name of *Leigh*; to qualify himself to take, in case the prior estates should determine, while he answered the description required; although the persons, so qualifying themselves, would be continually liable to be disappointed by the births of others, who would be prior and nearer; by whatever rule that proximity should be traced: if by the rules, which regulate the descent of real estates, by the sons of females of nearer degree; as would happen by the daughter of an elder brother having a son; who would, according to the rules of inheritance, be preferred to a cousin; who might before the son's birth have assumed the name: or, if the next of kin is to be looked for by the rules of the civil law, the same thing would happen, if the son of a female should be nearer in blood than a cousin, who might have assumed the name; as would be the case, if a second cousin were to assume the name, and a female first cousin should afterwards have a son.

If any rational construction can be put on this devise, I think, it cannot be supposed, that the testator meant so idle a thing as to induce his relations prospectively to take his name, when it might benefit none of them; as the prior estates might never determine, so as to give effect to the remainder; and, if it should take place, might occasion a frequent assumption of the name to become vain and nugatory; and on these grounds I conceive, that the testator did not mean, that the person, to take in remainder, should be one, who, in order to answer and complete the description in the Will, might assume his name; but

but that, when he spoke of the first and nearest of his kindred, being of his name, he meant, that he should be one, whose family name was *Leigh*; according to the opinion of the House of Lords in *Barlow v. Bateman* (4) and of Lord *Hardwicke* in the cases, put by him by way of illustration in *Pyot v. Pyot* (5); and this I think will appear, if effect be given to the several expressions, used by the testator.

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By the Will the person, to take the remainder, is to have these several qualifications: viz. he is to be the first and nearest of his kindred: the person must be a male: he must be of his name and of his blood. The three first circumstances, those of his being first and nearest of the testator's kindred and a male, need not for the purpose of the present question be considered. It will be sufficient to attend to the two last.

In a general sense the being of a man's kindred is being of his blood; as the word "consanguinity," which is the same as "kindred," imports; but when, in addition to being of his kindred, a testator requires, that the object of his bounty shall be of *his blood*, he must be understood as speaking of that blood, which with some propriety may be called *his*; namely that, which in tracing an heir is considered as the blood of the most dignity and worth. Such in this case is the blood of the *Leighs* in contradiction to that of any other of the testator's ancestors. When therefore he required, that the remainder-man should be of his blood, in addition to his being of his kindred, his object was, as I conceive, to ascertain, *that stock or family*, to which the devisee should belong; and that the word "*blood*," as used by the testator, must have the same sense given to it, as was given by Lord *Hardwicke* in *Pyot v. Pyot* (6) to the words "of the name of the *Pyots*."

The

(4) 3 *P. Will.* 65. 4 *Bro.*  
*P. C.* 194.

(5) 1 *Ves.* 335.  
(6) 1 *Ves.* 335.

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The next thing to be considered is, what did the testator mean by requiring, that the remainder-man should be of his *name*; and I do not think, that this testator by the words "*of my name*" meant the stock or family of *Leigh*; for according to the common rule of interpretation, which requires, especially in Wills, that every word shall have some effect given to it, if it may be, and none rejected, or considered as tautologous, if a distinct and consistent meaning can be put upon it, the testator must be taken to have intended something beyond what was expressed and contained in the other words, which he had used; and, I think, a very obvious meaning may be put upon the word "*name*" different from, and consistent with, that, which, I think, belongs to the word "*blood*;" and that it must be understood as intended to exclude the female line of the stock or family of the *Leighs*; which stock he may be understood as marking with the word "*blood*," and as intended to narrow the number of persons of that family or stock, from among whom a remainder-man was to be sought for; by requiring, that the family name of such person should be *Leigh*; or, in other words, that he should be a person having the name of *Leigh* from his agnation to the testator; thereby excluding any person, who could only claim to be of kin with the testator by descent from a female of his family.

If the Plaintiff does not fall within the description in the Will, it will not be necessary to consider, what relation of the testator would fall within it; or to inquire, whether any thing different was meant by the word "*first*" from what was intended by the word "*nearest*." Had the word "*first*" only been used, possibly it might be held to have been the intent of the testator, that the remainder should go to such person, as would take the estate, if it had descended to the testator in tail male
 from

from his eldest known ancestor of the name of *Leigh*; and possibly if the word "*nearest*" only had been used, the same interpretation might be put upon this devise; according to the sense, which in the cases, referred to in the *Touchstone* (7), mentioned by Mr. *Agar*, has been put upon the words "*proximo de sanguine*." But if the words "*first and nearest*" cannot be interpreted as meaning the same thing, viz. the first in a course of descent, and it should happen, that there is no person of his name and blood, who unites in himself the circumstances of being the first and nearest of the testator's kindred, the devise may be void for want of a person to take, answering the description in the Will: but if there be such person, who is also a male, and whose name, being *Leigh*, is referable to his descent from a common ancestor with the testator, no difficulty will arise from the use of both these expressions. However it will be time enough to consider such points, when some person shall claim the estate, who may derive the name of *Leigh* from his ancestors: but with respect to the present Plaintiff my opinion, which I submit with deference to your Lordship, is, that the person to take under the devise in question must be both of the testator's blood and name; and that the Plaintiff, having assumed the name of *Leigh* in pursuance of his Majesty's licence, does not satisfy the words of the Will; which require, that the person to take in remainder, after the determination of the estates, limited to his sisters and their issue, should be of his, the testator's, name; and I am of opinion the demurrer should be allowed.

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Construction
of the descrip-
tion "*proximo*
"*de sanguine*."

THOMPSON, *Baron*.

The question upon the facts, stated by this Bill, and admitted by the Demurrer, is, whether the Plaintiff is become

(7) *Shep. Touch.* 436.

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become entitled to the estate, devised under this Will, as answering the description, contained in that Will. It has been contended for the Plaintiff, that the fact, set forth by the Bill, that he has assumed the name of *Leigh* by his Majesty's licence, is sufficient to satisfy that part of the description; which in the event, that has happened, requires him to be of the name, as well as to possess the other requisites of being the first and nearest of his kindred, being male. Upon the best consideration, that I can give this case, I do not conceive, that the Plaintiff upon his own statement has made out a title under this Will. The meaning of this Will I conceive to be, that the person, who is to take in default of the preceding limitations, should be one, who could make himself out to be the first and nearest of the testator's kindred, being male, and of his name and blood; possessing that name by inheritance, if it may be so expressed, from the common ancestor; and not merely assuming it; though by his Majesty's licence. The testator has not imposed any condition upon his first and nearest of kindred, being male, that he shall take the name of *Leigh*: nor does any anxiety to perpetuate the name with the possession of the estate appear; as in the devise to his sisters and their issue there is no provision, requiring them or their issue to take the name: nor does he use the name, as connected with his devisees, until the clause in question; which is not to operate, until the period, which he contemplated, the deaths of both his sisters, and the failure of the issue of one, generally, and of the issue male of the other, should arrive.

Some of the cases cited appear very material. The case of *Pyot v. Pyot* (8) was a disposition by Will in a certain event of real and personal estate to the testatrix's nearest

nearest relation of the name of "the *Pyots*:" so it appears in the *Register's Book*; which I have examined; and not "of *Pyot*." Lord *Hardwicke* says, a person of nearer relation, but originally of another name, changing it to *Pyot* by Act of Parliament, would not come within the description; and, though in the contemplation of that case his Lordship admitted, that sisters, who at the date of the Will were of that name, and had afterwards married, and a sister, who had before that time changed her name by marriage, should share, he did so under an express declaration, that the term "*relation*" is *Nomen collectivum*: that the testatrix intended the same stock: the name there standing for the stock; and it appears by the *Register's Book*, that those persons and the testatrix were both descended from the common ancestor. At the conclusion of his judgment Lord *Hardwicke* refers to a case in the House of Lords; where the House of Lords held, that a voluntary change of name was not a performance of the condition to marry a person of the testator's name. That case is *Barlow v. Bateman* (9): a decision, which completely warrants the proposition, that a devise upon condition of marrying a man of a particular name is not satisfied by marrying a man, who voluntarily changes his name. That case is stronger than this; as there no connection of blood was required: she might choose from the world at large any man, who bore that name.

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Upon the whole of this case I have only to conclude with my humble advice to your Lordship, that the Plaintiff upon his own statement is not within the whole of that description, which he ought to have; in order to sustain the character of a person, entitled to these estates under this Decree in the events, that have happened.

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The Lord Chancellor.

It is unnecessary for me to attempt, what would be of no use to the Bar, to repeat, in terms not so apt to express them, the grounds upon which my own opinion is formed. I shall be content to acknowledge my obligation to the learned Judges, and simply to state, that the advice which I have received, confirms the opinion I had upon first reading this Bill; and which throughout the argument has never varied.

Therefore, without farther detaining the Judges, I shall merely say, that the title, stated by this Bill is not one, which proves, that the Plaintiff answers the description, required by the Will; and consequently my judgment is, that this Demurrer must be allowed.

1808.

May 16th.

OGLE, *Ex parte.*

Commission of Lunacy in a proper case granted upon the application of a stranger; and without regard to his motive: the Lunatic being a natural child; and his mother opposing it.

THE prayer of this Petition was, that a Commission of Lunacy might issue. There was no doubt, that the party was in a state, that made him a proper object of the Commission. He was a natural child; and resided with his mother; who opposed the Petition.

Sir *Samuel Romilly*, and Mr. *Courtney*, in support of the Petition, said, that the *Lord Chancellor* will attend to an application for this purpose even by a stranger (10); as it necessarily is in this case: the lunatic being a natural child; and his mother resisting a Commission.

Mr.

(10) See *Ex parte Ward*, ante, Vol. VI, 579.

Mr. Thomson opposed the petition; as unnecessary: the lunatic residing under the care of his mother; and attributed the application to an improper motive; alleging, that the petitioner, being a tenant to the lunatic, and in arrear for rent, took this step with the view to gain time.

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OGLE,
Ex parte.

The Lord CHANCELLOR.

The question is, whether upon the motives, attributed to this petitioner, I can refrain from giving the lunatic the protection of a Commission; if he is an object of it. That he is so there is no doubt. He is in actual custody; and clearly in such a state, that he is incapable of managing his own person or property. It is said, this application is made upon such motives, that it ought not to be attended to. I do not enter into the motives. The fact being made out, that this unfortunate person wants this protection, I must be very cautious not to incur the hazard of refusing it. The question now is, not, who is to be the Committee; but, whether some person is not to be selected, with due regard to his interest and affection for him, who shall have authority to act on his behalf, as it is admitted they are now acting without authority.

The Order was made accordingly, that the Commission should issue.

1808.

May 20th.

A second Commission against an uncertificated Bankrupt cannot be maintained; whether separate or joint.

MARTIN, *Ex parte.*

IN *May*, 1806, a Commission of Bankruptcy issued against *George Vaughan*; who afterwards entered into partnership with *Richard Mackilwain*. In *February*, 1807, *Vaughan* not having obtained his certificate, a joint Commission issued against *Vaughan* and *Mackilwain*; and in *July*, 1807, a separate Commission issued against *Mackilwain* during his absence abroad. Upon his return he obtained leave to surrender; and the assignees under his separate Commission presented this Petition, that the joint Commission should be superseded.

Sir *Samuel Romilly* and Mr. *Cooke*, in support of the Petition, contended, that the joint Commission could not be supported: one of the objects of it being at the time it issued an uncertificated bankrupt.

Mr. *Thomson* and Mr. *Treslove*, opposed the Petition; contending, that under circumstances the second Commission might be left to operate; according to the cases, *Ex parte Proudfoot* (11), *Troughton v. Gitley* (12), *Ex parte Brown* (13), *Everett v. Backhouse* (14); and that the Lord Chancellor would consider, what would be the most convenient course; suggesting, that all the debts under the first Commission against *Vaughan* had been paid; and proposing to supersede that Commission.

[* 115] Sir *Samuel Romilly*, in Reply, observed, that there was no suggestion of any circumstances, such as occurred in * the case of *Troughton v. Gitley*; and the law is the same; whether the second Commission is joint or separate.

The

(11) 1 Atk. 252.

(12) Amb. 630.

(13) Ante, Vol. II, 67; see the note, 69.

(14) Ante, Vol. X, 94.

The Lord CHANCELLOR.

It is very clearly settled, that if a man has been declared a bankrupt under a separate Commission, another Commission against him cannot be maintained; until he has obtained his certificate under the former. Great inconvenience may perhaps ensue, if he should trade afterwards: but it is truly observed, that the assignees cannot prevent his trading; if he chooses to run the risk of their taking possession of the property he may acquire. The consequence is, that, when the second Commission is taken out, he cannot, unless there are very special circumstances, have any property whatever; and the circumstance, that the second is a joint Commission, can make no difference: it must be void as much as a separate Commission. A farther consequence is, that the joint Commission, not being good against *Vaughan*, cannot be sustained against *Mackilwain* (15): as a joint Commission it cannot stand against either: nor, as a separate Commission, against *Mackilwain*.

1808.

MARTIN,

Ex parte.

A joint Commission of Bankruptcy, void as to one partner, cannot be maintained against the other.

(Altered by stat. 6 Geo. IV. c. 16. s. 16.)

This does not resemble the ordinary case of a joint and a separate Commission; which formerly were permitted to stand together at the hazard of all the inconvenience, that might arise with reference to legal questions: but that course is altered; and now, if the joint Commission can be sustained, it stands; and the assignees can at law recover both the joint and separate estate; and the joint Commission alone

The former course in Bankruptcy was, that a joint and a separate Commission stood together. Now the joint Commission alone

(15) The effect was the same if there were more than two partners: *Ex parte Layton*, ante, Vol. VI, 434. See the note, 440: but by stat. 6 Geo. IV. c. 16. s. 16. a Commission may issue against two or more, exclusively, of a firm consisting of a greater number of partners; and may be superseded as to one or more exclusively.

stands: the Assignees can at law recover both the joint and separate estate; and the same distribution is made, as if both Commissions stood.

1808.
 MARTIN,
Ex parte.

and by Order under that Commission the same distribution is made, as if both Commissions stood. There is a Commission, antecedent to both of these. With respect to *Troughton v. Gitley* (16), very great difficulties occur upon that case; and, though it was the decision of Lord *Camden*, it has never been considered as of very high authority. If the bankrupt purchased the stock for himself with the money of a third person, the equity ought to have been administered accordingly: if it was not purchased with the money of a third person, it was purchased with that, which was the property of the assignees; and then the sale was without consideration.

If the creditors, who oppose this Petition, will not undertake to supersede the first Commission against *Vaughan*, I do not see, how I can help them.

The Petition stood over; and the examination of *Mackilwain* was postponed for a week.

(16) *Amb.* 630.

1808.

JACKSON, *Ex parte.*

May 21st.
 The privilege
 of a party, at-
 tending his
 own cause,
 from arrest

THIS Petition was presented by a bankrupt; stating, that upon the 2d of *April*, after he had left the Court, where he had been attending the hearing of his petition extends to a Bankrupt on his return from attending his Petition for leave to surrender after expiration of the time; having deviated no farther than to call on the Solicitor to arrange the proper steps for giving effect to the Order.

petition for leave to surrender to his Commission, before he returned to his lodging, and on his return, he called upon the agent to the Solicitor of the Commission at the request of that agent, for the purpose of arranging the proper steps, to be taken by him, for giving effect to the *Lord Chancellor's Order*; and was taken in execution immediately as he went out of the house of the agent. When the Commission issued, the petitioner was at sea; and did not know of it: the only object of his return was to surrender; and for that purpose he intended to leave *London* the evening of the day, on which he was arrested.

1808.

JACKSON,
Ex parte.

The prayer of the petition was, that the *Lord Chancellor* would order, that the petitioner should be discharged.

Mr. Hall, in support of the Petition.

The petitioner, arrested, as he was returning from the Court, where he had been attending his own petition, and having deviated no farther, and for no other purpose, than as the petition states, must be discharged, upon all the authorities: *Arding v. Flower* (17), *Meekins v. Smith* (18), *Ex parte King* (19), *Sidgier v. Birch* (20). In *Meekins v. Smith* this general rule is established; that all persons, having a relation to a suit, calling for their attendance, whether compelled by process, or not, including bail, are entitled to protection; provided they come *bond fide*. Apply that general rule to the particular circumstances of this case: this petitioner attending his own petition, for a purpose the most interesting to him; perfectly *bond fide*; with the view to give facility to that most important object;

(17) 8 *Term Rep.* 534.(19) *Ante*, Vol. VII, 312.(18) 1 *Hen. Black*, 636.*See the note*, III, 351.(20) *Ante*, Vol. IX, 69.

1808.

JACKSON,
Ex parte.

object; and this slight deviation, still in the prosecution of the same object, merely to make arrangements with his agent for his surrender and examination under the Order he had obtained, cannot deprive him of the protection. Cases have occurred of considerable deviations, which have not affected the privilege. *Lightfoot v. Cameron* (21) is a very strong instance.

Sir *Samuel Romilly*, for the Plaintiff, in the Action, in which the Petitioner had been taken in execution: Mr. *Cooke*, and Mr. *Wingfield*, for Creditors, who had lodged Detainers.

This privilege is confined to persons, whose attendance is necessary to the administration of justice: witnesses, for instance: or the attorneys: but where is the use of the party's attendance: how can that promote the ends of justice? His anxiety about the event cannot entitle him to the privilege. His petition must have been decided upon the affidavits; not upon his allegations in Court. In *Arding v. Flower* (22) the person attending had been actually examined by the Commissioners. *Meekins v. Smith* (23) is the case of bail; who must justify in Court.

If he could claim protection, while attending the hearing of his petition, the deviation was in the prosecution not of that petition, but of business, merely relating to the subject of it, and arising out of the Order, which had been made.

Mr. *Hall*, in Reply, insisted, that clearly the party, attending the hearing of his own cause, in any stage of it, when his presence may be material for the assistance

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* of his Counsel, must be protected; and the protection must be extended to consequential business, in the prosecution

(21) 2 *Black.* 1113.

(23) 1 *Hen. Black.* 636.

(22) 8 *Term Rep.* 534.

secution of the original, and with a view to subsequent proceedings.

1808.

JACKSON,
Ex parte.

The Lord CHANCELLOR.

There is no doubt, that the privilege extends to a Plaintiff, or a Defendant, attending his own cause. That was determined by Lord *Kenyon*; upon the ground, that a party may give useful information, as the cause proceeds. If a party, attending his cause, or motion, is privileged, I think, a bankrupt, attending such a petition, as this was, and *bonâ fide cundo et redeundo*, is privileged; as I cannot conceive a case, in which the personal attendance of the party can be more reasonable than upon such a petition. This bankrupt had not surrendered within the time prescribed by law; and was therefore liable to a capital indictment. The Order of the *Lord Chancellor* does not protect him from a prosecution; amounting to no more than a sort of declaration, that the *Lord Chancellor* does not see reason to think, that, if prosecuted, he would be convicted: a declaration, which is not made, except under circumstances, that call for it (24); and the bankrupt, attending, to give such explanations as may lead to that declaration, has every claim to protection, that a party, attending his own cause, in general, can have. This bankrupt therefore, if he was *bonâ fide* returning, was entitled to protection.

Effect of the
Lord Chancellor's Order,
permitting a
Bankrupt to
surrender af-
ter expiration
of the time;
not protecting
him from a
prosecution.

That leads to the second question; with respect to which I have frequently thought, and my own strong declaration appears in the case of *Sidgier v. Birch* (25); that it is to be regretted, that the Judges giving effect to their commiseration in these cases, were not enabled to

(24) Ante, *Ex parte Grey*, *Ricketts*, VI, 445, and the Vol. I, 195. *Ex parte* notes.

(25) Ante, Vol. IX, 69.

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Ex parte.

to lay down some more intelligible rule; as it is very difficult to say, what a creditor may venture, and what the person, claiming the privilege, may presume, to do, under a rule, so very loose, as it appears upon all the cases: but my opinion is, that, if this deviation is no more, than, after the Order was made, calling upon the solicitor, to inform him of it, and to inquire, how that Order was to be carried into effect by the surrender and examination, it is so much less of deviation, than many, against which the privilege has prevailed, that these creditors must discharge the petitioner.

1808.

BAYNES v. FRY.

May 27th.

A reasonable Commission, beyond legal interest, for extra incidental charges, as upon agency in the remittance of bills, not usurious.

UPON a motion for an injunction to restrain the sale of a cargo in the *London Docks* an objection was taken to a claim of lien for Commission upon a transaction, which by the accounts, that were produced, appeared to be of this nature. *Hanson*, the person, making the claim of Commission, having advanced money upon the terms of receiving interest at 5 *per cent.* took bills upon *Hamburgh*; which bills he sent there for the purpose of procuring acceptance and payment, and a remittance of the amount. The Commission was charged upon that transaction.

Sir *Samuel Romilly*, in support of the Motion, contended, that this was usurious.

Mr.

Mr. *Hart* and Mr. *Cooke*, insisted upon the cases, *Auriol v. Thomas* (26), and *Benson v. Parry* (27), that a reasonable charge for remittance and other incidental expences, even upon a common transaction of discounting inland bills in this country, is not usurious: but this business abroad is not conducted as discounts here: the bills in foreign countries being taken to the Exchange and sold in the public market.

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BAYNES
v.
FRY.

The Lord CHANCELLOR.

The first case upon this point was that upon the circuit in 1780, *Benson v. Parry*; where Lord Chief Justice, then Baron, *Eyre* held, that a country banker, discounting bills, payable in *London*, could not take a Commission: but that was set right upon an application to the Court. I take the facts of this case, as far as I can understand them from the accounts, that have been handed up, to stand thus; *Hanson* advanced money to these parties upon the terms of receiving interest; desiring them, if they had bills upon *Hamburgh*, to put them into his hands, for the purpose of sending them there, to procure acceptance and payment; in order to bring himself home; taking a reasonable Commission for his trouble in doing so. That according to modern doctrine is not usurious: therefore I cannot make the Order, prayed upon this Motion.

(26) 2 Term Rep. 52.

Bank. Cas. 29. Ex parte

(27) Cited 2 Term Rep. 52.

Henson, 1 Madd. 112. Ham-

Hereford Summer Assizes,

mett v. Yea, 1 Bos. & Pul.

1780. Ex parte Jones, post,

144. Kent v. Lowen, 1 Campb,

Vol. XVII, 332. 1 Rose

178.

1808.

WALKER v. SHORE.

May 29th.

Bequest of the produce of the sale of a copyhold estate to A. the wife of B. for life; and after her death to divide the principal among the children of B.

and C. equally; and of the testator's reversionary interest in Bank Stock on the death of D. if in his name at his decease, and if not, at D.'s death, equally among the same children. Vested interests in all the children; comprising those, who died, and those, who came into existence, after the death of

FELIX VAUGHAN, being seised to him and his heirs, according to the custom of the manor of *Tottenham*, of one undivided fourth-part of copyhold premises, which he had surrendered to the use of his Will, and being entitled, among other personal estate, to a reversionary interest in 2000*l.* Bank Stock, after the death of *Mary Baker*, by his Will, dated the 25th of *May*, 1798, after certain legacies, made the following disposition:

" I leave all that my copyhold ground-rent in *Tottenham Court Road* to my executors upon trust that they shall at such time and in such manner as they shall think proper (their receipt to be a sufficient discharge to any purchaser or purchasers thereof) make sale thereof; and place the money arising from such sale upon such securities as they shall think proper; and to pay and apply the dividends and produce thereof to the sole and separate use of *Jane Walker* (wife of *Thomas Walker*, of *Manchester*) for and during her natural life independent of her present or any future husband, his debts or engagements; and after her decease to divide the principal money arising from such sale amongst the children of the said *Thomas* and *Richard Walker* share and share alike; and I also leave to my executors all that 2000*l.* capital Bank Stock reverting to me on the death of *Mrs. Mary Baker* upon trust to make sale thereof in case the same shall be in my name at my decease and if not as soon as the said

" *Mary*

the Testator and during the lives of the tenants for life.

The interest of small legacies ordered to be paid to the mother, for maintenance, upon her affidavit, that the father was abroad in very embarrassed circumstances.

"*Mary Baker* shall die at the discretion of my executors and to apply the money arising from the sale thereof or the said stock itself equally amongst the children of the said *Thomas Walker* and *Richard Walker*."

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WALKER
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The testator died in 1799. *Mary Baker* afterwards died. *Hannah*, the wife of *Thomas Walker*, by mistake in the Will called *Jane*, was still living. At the death of the testator there were six children of *Thomas Walker*; of whom one died since the death of the testator; having attained the age of twenty-one, and assigned her interest in the trust funds under the Will to her father *Thomas Walker*. There were also at the death of the testator six children of *Richard Walker*; and since the death of the testator, but before the death of *Mary Baker*, *Richard Walker* had another child born, *Felix Walker*. *William Walker*, one of the children of *Richard Walker*, died in 1804; and his father was his administrator.

The Bill was filed by *Thomas Walker*, and the surviving children of *Thomas* and *Richard Walker*, except *Felix*, against the executors of *Vaughan*, the testator, and against *Richard Walker* and *Felix Walker*; praying, that the Plaintiffs may be declared entitled together with *Richard Walker*, as the only children, and the representative of the deceased child, who were living at the death of the testator, to one twelfth part, respectively, of the fund, produced by the Bank Annuities, and of the money hereafter to arise from the sale of the copyhold estate; and for an allowance for maintenance of the infants out of the interest of their shares.

It was admitted at the Bar, and by the *Lord Chancellor*, that children, who died during the lives of *Hannah Walker*

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 v.
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Walker and Mary Baker, took vested interests, transmissible to their representatives; according to *De Visne v. Mello* (28), and many other cases.

Sir *Samuel Romilly* and Mr. *Phillimore*, for the Plaintiffs.

Felix Walker, a child born after the death of the testator, is not entitled to share under this Will. There are two circumstances, taking this out of the general rule. The testator clearly intended to give to the same persons the produce of the copyhold estate and of the Bank Stock: yet it must be contended against the Plaintiffs, that different persons are to take them; as they are to be distributed upon the deaths of different persons. There is but one mode of giving this property to the same persons; and that is by giving it to those, who were living at the death of the testator. Another circumstance is, that, as to the Bank Stock, this is not a case, in which the testator has himself given an estate for life, and then the reversionary interest: he has not himself created any interest, by which the vesting is to be postponed: but this is a reversionary interest, which he previously had, and gives to the children of the two persons named.

Mr. *Martin* and Mr. *Wingfield*, for the Defendants.

This case falls within the general rule, that the property is to be distributed among all the objects, who shall have come into existence before the death of the tenant for life. The same sort of disposition would not suit the different interests to be had in the two subjects: an absolute, vested, estate in the copyhold; a reversionary interest

interest only in the stock. To that difference of interest, not to any different intention, is to be attributed the distribution of the one fund immediately upon the death of *Mary Baker*.

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WALKER
v.
SHORE.

The Lord CHANCELLOR.

The construction, which I am obliged to make in this case, may break in upon the actual intention of the testator. I believe, he intended, that the same persons should take both these funds: yet it seems impossible upon fair judicial construction not to apply to the fund, which is to be distributed upon the death of *Mary Baker*, the rule, that must be applied to the copyhold estate; which is directly within the principle, upon which the rule is founded; that as many persons are to be comprehended, as may be, by looking to the period of distribution (29). The testator probably meant children at his own death: yet upon the authorities the Will must be construed to mean such as should come into existence before the period of distribution; a rule, that is not to be shaken unless a time of distribution is expressly provided; excluding all, who may afterwards come into existence: not that the Court would not be inclined to comprehend them; but that the instant any of the children are to take the Court must decide, what children are to take that, which is to be distributed among them (30).

In a legacy to the children of A. those born before the time of distribution are entitled to share; unless a time of distribution is expressly provided, excluding those, born afterwards, by the necessity of a previous sale distribution.

As to the Bank Stock, considering the rule, I think the distinction too thin, that the interest for life is not the gift of the testator himself. By that clause the testator appears to me to say, that, if the trustees could at his death apply the stock, or the money, produced by the

(29) *Ellison v. Airey*, 1 Vcs. 111. *bread v. Lord St. John*, X, 152; and the references in

(30) *Ante*, *Gilbert v. Boorman*, Vol. XI, 238. *Whit-*

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sale of it, as they could not, if *Mary Baker* was living, they were to apply it at that time; but if by her surviving him they could not then apply the fund, the period of distribution must in that instance also take in this after-born child.

The Decree accordingly declared the Defendant *Felix Walker* entitled to a thirteenth share of the funds under the Will.

Sir *Samuel Romilly* applied for maintenance of the children of *Richard Walker* upon the affidavit of their mother, that her husband was in *Sicily* in very embarrassed circumstances: the share of each child not exceeding 300*l.* The interest was accordingly directed to be paid to their mother, and applied for maintenance until farther Order.

KING, *Ex parte*.

1808.
 May 30*th*.
 Judicial discretion of
 Commissioners of Bank-
 ruptcy as to
 the Certificate
 not subject to control.

THE Petitioner, a bankrupt, renewed his application (31) for an Order to the Commissioners to sign his Certificate.

Mr.

(31) *Ex parte King*, ante, Vol. XI, 417. XIII, 181.

Bankrupt's Certificate sent back for the purpose of letting in other creditors: the Commissioners not confined by that object: nor bound by the original Certificate: but the whole is open to their judicial discretion: the original and supplemental act making but one Certificate, of the latter date.

Mr. *Montague*, in support of the Petition, contended, that the Commissioners were bound by their signature of the original certificate: so that, when the certificate was sent back by the *Lord Chancellor* for the purpose of letting in the proof of other creditors, the discretion of the Commissioners was confined to a supplemental certificate with the signature of the proportion of those new creditors, required by the Act of Parliament.

1808.
KING,
Ex parte.

The Lord CHANCELLOR.

The question upon this application is, whether the original certificate of the Commissioners is to be considered as the due execution of the duty, imposed upon them; and the supplemental certificate is to amount to nothing more than a notification to the Great Seal, that four-fifths in number and value (32) of the subsequent creditors have given their consent. My opinion is, that the meaning of the Statute (33), truly understood, and explained by the practice, is, that, if the *Lord Chancellor* thinks proper to send back the certificate to the Commissioners, to be reviewed, when they again certify, with reference to the subsequent proceedings, they are understood, whatever the form may be, to re-certify all, that they have before certified. That being the true view of the Statute, as explained by the practice, if the Commissioners cannot conscientiously and judicially certify what is contained in the former certificate, they cannot be called upon to re-certify in obedience to that last Order.

I hold firmly to the opinion, which I expressed upon the former application of this bankrupt (34); which was confirmed

(32) The proportion of creditors, required to sign the certificate, is reduced to three fifths in number and value, or nine tenths in number, after six months from the last examination, by the Act of Parliament, 6 Geo. IV. c. 16. s. 122.

(33) Stat. 5 Geo. II. c. 30.

(34) Ante, Vol. XI, 417.

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 KING,  
*Ex parte.*

confirmed by Lord *Erskine* (35), and by the Court of King's Bench (36); that no Court of Justice has power to compel the Commissioners to certify. They have a judicial discretion, given to them by the Act of Parliament; and it is in vain to urge, that there is no remedy: the law having entrusted them with that judicial discretion, no Court can take it from them; and if any mischief arises from it, a remedy must be sought elsewhere; and cannot be supplied by those, who are to interpret, not to create, the law. The Statute, which inflicts severe penalties upon the bankrupt, gives him, if he does conform, a great variety of benefits; besides an allowance out of his effects, in proportion to their amount, declaring him discharged from all the debts he owed at the time he became a bankrupt. The Act then proceeds to state the terms, upon which he is to acquire those benefits; with very particular provisions as to the Certificate; one of which, that, I conceive, entrusts the Commissioners with a judicial authority and discretion, is, thus expressed: "that there doth not appear to them any reason to doubt of the truth of such discovery; or that the same is not a full discovery of all such bankrupt's estate and effects;" and the clause concludes with this material declaration; "nor shall any Commissioner sign such Certificate, till after four parts in five in number and value of the said creditors shall have signed the same, as afore-said."

The construction of this Statute has always been, that, though, after the creditors, the Commissioners had signed the Certificate, and it was laid before the Great Seal, for allowance, the *Lord Chancellor* will himself judge of this at least; whether it is fit, with reference to the interest of the creditors to send back the Certificate to the Commissioners

(35) Ante, Vol. XIII, 181.

(36) 7 *East*, 92.

missioners; and for the purpose, among others, of permitting other creditors, who, living at a distance, might not have had an opportunity, to prove, and express their assent or dissent: but no argument, that has been addressed to me, proves, that the Commissioners, having once signed the certificate, are more *functi officio* as to one point, than they must be taken to be as to every other; and, the Statute requiring, that the Commissioners shall not sign, until the creditors have signed, the necessary inference is, that, if the certificate is sent back to the Commissioners to be reviewed, it must be considered, as if it had never gone out of their hands; and, when the new body of creditors come in, that it is in consequence of those creditors signing that the Commissioners are then authorized to sign; and the original and supplemental certificates are taken to be but one certificate: the statute meaning, that there should be only one certificate; and, when it comes the second time before the *Lord Chancellor*, the whole is to be taken as one certificate. Upon the reason of the thing the consequences would be very awkward; if it could be considered any other way; as, when those new creditors shall appear to have proved after the first certificate, unless the supplemental certificate is to give the date to the whole, it would appear upon the face of it, that the Commissioners had signed, before they were authorized.

Another circumstance is, that it may happen, that the very proof of the creditors, entitled to come in under the Order, referring the certificate to the Commissioners, to be reviewed, may disclose for the first time, that the bankrupt had concealed his property: so that the Commissioners cannot conscientiously sign the certificate. Suppose, for instance, the proof made by these creditors in respect of property, sold to the bankrupt; as to which he had made no disclosure. The whole practice there-

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 KING,
Ex parte.

fore, as to sending back the certificate, authorizes me to consider the original and the supplemental certificates but as one; and the whole as speaking at the date of the latter; and, if the Commissioners cannot judicially and conscientiously certify at that date, it is not in the power of the Great Seal to order them to make the supplemental certificate; that, together with the original certificate, forming at that time the subject, entrusted by the Statute to their judicial discretion.

I can therefore do nothing upon this Petition.

1808.
 May 20th, 21st.

ALLAN v. ALLAN.

To support a Bill to perpetuate testimony the Plaintiff must have an interest: but the minuteness or remoteness of it is no objection. A mere contingency,

however near and valuable (with the exception of the case of a wager), the expectation of issue in tail, heir apparent, or next of kin of a lunatic, is not sufficient.

Therefore a Demurrer to a Bill by tenant in tail in remainder and his issue to perpetuate testimony of the validity of his marriage, allowed.

Whether a Bill could be maintained by the trustees to preserve contingent remainders, representing also the legal inheritance of the whole estate, *Quære*.

THE Bill in this cause, filed by *Robert Allan*, and *Hannah*, his wife, and their infant children, by their father and next friend, against *John Allan*, and *George Allan* the younger, stated, that *Ann Allan* by her Will devised several estates mentioned and all other her real estates in the counties of *York* and *Durham* unto and to the use of her cousin *James Allan* the elder and his assigns for and during his life without impeachment of waste; and after his decease then she gave and devised

vised all her said several freehold, leasehold, and copyhold, estates, and all other her real estates, &c. unto and to the use of her cousin *George Allan* the elder, (eldest son of *James Allan* the elder) for his life without impeachment of waste; and, after his decease she devised all her said estates to trustees, their heirs and assigns, for ever, to the use of them and their heirs, upon the trusts, and subject to the powers, provisos and limitations, after expressed; that is to say: in trust for the Defendant *George Allan* the younger, eldest son of *George Allan* the elder, for life, without impeachment of waste; with remainder to the same trustees, to preserve contingent remainders; and, from and after his decease, in trust for his first and other sons, and the heirs male of the body and bodies of such son and sons; and, in default of such issue, in trust for all and every other son and sons of *George Allan* the elder, severally, successively and in remainder, as before limited with respect to the sons of *George Allan* the younger; and, in default of such issue, in trust for her cousin *James Allan* the younger, another son of *James Allan* the elder, for life, &c. with similar remainders to his first and other sons; and, for default of such issue, in trust for her cousin *Robert Allan*, since deceased, the father of the Plaintiff *Robert Allan* (another son of *James Allan* the elder) for life, without impeachment of waste; with remainder to the trustees to preserve contingent remainders; and, after his decease in trust for his first and other sons, and the respective heirs male of such son and sons; and, for default of such issue, in trust for *James Allan* the elder, his heirs and assigns, for ever.

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The Bill farther stated, that after the death of the testatrix, in 1785, *James Allan* the elder, died without issue; upon which *George Allan* the elder, entered; and

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died; leaving the Defendant *George Allan* the younger, his only child; who entered upon, and became possessed of, the devised estates; never having had any issue. *James Allan* the younger, another son of *James Allan* the elder, and the next in remainder under the Will, also died; without leaving any issue; and *Robert Allan* the elder, the father of the Plaintiff *Robert Allan*, who was next in remainder to *James Allan* the younger, died; leaving the Plaintiff *Robert Allan*, his eldest son and heir at law, and *John Allan*, the other Defendant, his younger son, his only male issue surviving.

The Bill also stated, that *George Allan* the younger, the present tenant for life, is also heir at law of *James Allan* the elder; to whom the ultimate remainder in fee is limited in failure of issue male of the several persons, taking under the limitations. The Plaintiffs *Robert* and *Hannah Allan* were married in 1792 at *Gretna*, in *North Britain*; being both of full age; and the other Plaintiffs, *William*, *Robert*, *John*, and *George*, were the issue of that marriage. The Bill then, suggesting pretences of doubts as to the legality of that marriage, and meeting them with proper charges, prayed a discovery; and that the Plaintiffs *Robert Allan* and *Hannah*, his wife, must be at liberty to examine witnesses to their marriage, and the subsequent births of their children, and that the testimony may be perpetuated.

To this Bill a Demurrer was put in.

*Mr. Bell*, in support of the Demurrer.

This Bill cannot be supported; as far it is a bill by the father, having a vested remainder in tail, to perpetuate testimony as to his marriage, and establish the legitimacy of his children. Whether married or not, he  
 has

has an estate-tail: his interest therefore cannot be affected by the fact, which the testimony is to establish. As to his children, it is equally clear, that the Bill cannot be supported; according to the principle, admitted in the case of *Lord Dursley v. Fitzhardinge Berkeley* (37), and *Smith v. The Attorney General* (38); that an heir apparent cannot during the life of his ancestor file a Bill to perpetuate testimony to the fact, that he is the heir. The question upon this demurrer is, whether an heir in tail can during the life of his ancestor maintain a Bill to perpetuate testimony to the fact, that he is heir in tail. The interest of an heir apparent of either description is much less substantial, affording less foundation for such a Bill, than the expectation of the next of kin of a lunatic upon the event of his death.

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Mr. Hart and Mr. Wetherell, for the Plaintiffs.

The object of this Bill is to perpetuate testimony of a fact, upon which the title of the Plaintiffs depends. Any person, who has any interest in any subject of property, which interest has not fallen into possession, the right to which cannot be brought to decision, and depends upon testimony, which may be lost, before that opportunity can arise, is entitled to come here for the purpose of perpetuating that perishable testimony. The interest of the issue in tail is very distinct, as to all persons, except the tenant in tail: a remote interest certainly; but which is regarded by the Court; considering, that all the rights may remain, as they now stand, until the lives in succession may drop; with the possibility, that

(37) Ante, Vol. VI, 251. Grey and Lord Chief Baron  
(38) In Chancery, 1777; Skynner: cited ante, Vol. VI,  
before Lord Bathurst, assisted by Lord Chief Justice De 255.

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that they may drop in the series of limitation, in which they stand in the Will. In that respect these Plaintiffs may unite their interests. The interest of the issue in tail is not to be compared to the mere expectancy of an heir. This is an expectancy in Law; which cannot be defeated except by an act of the ancestor; who may by a fine annul that expectation: but without that act the issue must upon the death of the tenant in tail inevitably succeed *per formam Doni*; having that expectancy, which the Law regards as an interest. As your Lordship observes in *Lord Dursley v. Fitzhardinge Berkeley* (39), the right cannot depend upon the proximity, or the value, of the interest. The interest of the issue in tail cannot be set up against the father; as he can immediately by barring the intail render that interest nugatory: but this Bill is filed by the tenant in tail jointly with his issue; asserting, that he has no intention to affect their rights; and the question is, whether the tenant in tail, though embracing in himself all the remainders over, and the issue jointly, have not a present interest, which will enable them to establish those facts, that will keep the estate in their family. An estate-tail has this peculiar nature, depending upon the Statute (40): that the issue, though taking in one sense by descent, as an heir at law, take also under the same title, as the ancestor, through whom they claim; both deriving title by one common instrument; that title in the issue capable of being affected only by a particular act: an heir at law having a mere hope of succession.

“ The Reply was stopped by the Court.

The

• (39) Ante, Vol. VI, 251.

(40) Statute *Westminster 2*
13 Edw. I.

The Lord CHANCELLOR.

I take it as admitted at present, that this is an equitable estate tail; though perhaps that may deserve examination in the case of a confused Will; as this appears upon the Bill. If it was a legal estate, the Wife might have an interest in respect of her right to dower. The issue perhaps are not very accurately called heirs in tail. They are, not remainder-men, but issue only: in common parlance issue in tail of the tenant in tail. These persons thus standing upon the record, as Plaintiffs, the father must be supposed to sue for some interest, which his children have in the subject of the suit. One of the Defendants stands behind the Plaintiff *Robert Allen*, as tenant in tail under the Will.

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From the state of facts, appearing upon this record, it is obvious, that *Robert*, the father, with a view to make good his title, has no interest whatever in proving the fact of his marriage: the remainder in tail being vested in him. The other Plaintiffs are neither tenants in tail, nor remainder-men in tail; but the issue of a person, who is *de facto et de jure* tenant in remainder in tail; having in him the whole interest. The father having no interest whatsoever to sustain a Bill to perpetuate testimony, as far as he is concerned, the question is, whether the children have such a present interest in this estate, and therefore such an interest in perpetuating the testimony, that they can in respect of their interest maintain this Bill.

Some things are very clear. First, it is perfectly immaterial, how minute the interest may be; how distant the possibility of the possession of that minute interest: if it is a present interest. A present interest, the enjoyment of which may depend upon the most remote and improbable

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bable contingency, is nevertheless a present estate; and, as in the case (41) upon Lord *Berkeley's* Will, though the interest may, with reference to the chance, be worth nothing, yet it is in contemplation of Law an estate and interest. On the other hand, though the contingency may be ever so proximate and valuable, yet, if the party has not by virtue of that an estate, the Court does not deal with him: I except the case of a wager, and the interest in respect of that wager. Upon that ground the case of *Smith v. The Attorney General* was decided: the case of Mr. *Newport*, a lunatic: upon a demurrer by Lord *Thurlow*; who was then *Attorney-General*; and Lord *Kenyon* contended, that the argument must go to the extent, even of an admitted intestacy and irrecoverable lunacy; that, if the party, and every witness, could not live an hour, yet the title of the next of kin must be repelled; and that Bill was repelled: the Court holding, that it was nothing but an interest in expectancy; which did not entitle him to come to this Court; and to maintain his right; and Lord Chief Justice *De Grey* reasoned by analogy to the case of the distinction between *Hæres Apparens* and *Verus Hæres*; that the former could not have the writ *De Ventre Inspiciendo*; as the other might; concluding, that upon the same ground the heir to a fee-simple estate could not support this claim.

Then, is there any such specialty in the case of the issue in tail, during the life of the tenant in tail; that, though the eldest son of tenant in fee could not maintain such a claim, the heir male apparent of tenant in tail male, or the issue of tenant in tail, may? That must depend upon this; whether that heir male, or issue in tail, have an expectancy in the common sense, or that species

(41) *Lord Dursley v. Fitzhardinge Berkeley*, ante, Vol. VI, 251.

species of expectancy, which is in contemplation of law a present interest. Originally an estate tail was an estate upon condition; to become a fee; when issue was had. It was then in the power of the tenant in tail to alien: but still it was not an absolute estate; as, if he did not take advantage of that power, and did not alien, the estate would have descended according to the form of the gift: but there is no case, in which the tenant in tail has not been considered, as between him and his issue, as having the entire interest. The Statute *De Donis* (42) certainly does say, that the estate is to go according to the form of the gift; and gives the forms of the writs; which are of different sorts: but I cannot find, that any Formedon was ever brought by the issue during the life of the tenant in tail. That demonstrates, that the estate is in the tenant in tail for the time being himself; and then the reasoning, that applies to tenant in fee, must apply to tenant in tail. Therefore, however unfortunate the circumstances of this case are, I cannot find a principle, upon which this Bill can be maintained. There are trustees to preserve contingent remainders; representing also the legal inheritance of the whole estate. I have not much considered, how far those trustees could maintain a Bill; which must be attended with great difficulty: but it is sufficient at present to observe, that they are not Plaintiffs.

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ALLAN  
v.  
ALLAN.  
Originally an estate tail was an estate upon condition; to become a fee upon issue had, for the purpose of alienation: but not absolutely; as, if not aliened, it descended *per formam Doni*. No Formedon for the issue in the life of tenant in tail.

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The Demurrer was allowed.

(42) Stat. Westminster 2. 13 Edw. I.

1808.

June 23d.

## CROCKFORD v. ALEXANDER.

Injunction  
against cutting  
Timber in the  
case of Tres-  
pass: viz. by a  
person, having  
got possession  
under articles  
to purchase.

**T**HE Plaintiff having contracted to sell an estate to the Defendant, the latter obtained possession from the tenant; and began to cut timber; upon which the Bill was filed, and a Motion made, for an Injunction.

Mr. *Cullen*, in support of the Motion, observed, that this was a case of trespass.

*The Lord CHANCELLOR.*

Distinction be-  
tween Waste  
and Trespass,  
or destruction;  
where there is  
no privity.

Although at law this Defendant is a trespasser, he is in equity by the effect of the contract the owner of this estate; having taken possession under the contract; and the vendor is in the situation of an equitable mortgage (43). This Court has occasionally granted an Injunction in cases of trespass as well as waste; and, having thought much upon this subject, I will grant this protection against cutting timber; until the power of the Court to grant the Injunction against trespass shall be fully discussed. Lord *Thurlow* refused the Injunction in this case (44): a man, possessed of two fields, demised one, with the mines under it: the lessee found his way, working under ground, to the mines under the other field, which was not demised: Lord *Thurlow* held that to be trespass, not waste; and did not grant the Injunction. There are however several cases, furnishing principles by analogy. In *Lord Byron's Case* (45) it was destruction, not waste: there being no privity between Lord *Byron* and the persons, who had the mills. There is no difference between de-  
struction,

(43) *Paine v. Meller*, ante, ante, Vol. VI, 147, and the Vol. VI, 349, and the note, note.

352.

(45) *Robinson v. Lord By-*(44) See *Mitchell v. Dors*, ron, 1 Bro. C. C. 588.

struction, and trespass, where there is no privity of estate; and at law the writ of *Estrepement* may be had to prevent repetition of waste. I have therefore ventured to grant an injunction in trespass; and this Defendant will find it very difficult to maintain, that he can use his legal character of trespasser, in order to enable himself to commit what is absolute destruction.

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v.  
ALEXANDER.  
Writ of *Estrepement* to prevent repetition of waste.

The Order for the Injunction was made.

STEVENS v. BAGWELL.

ROLLS.  
1808.  
Jan. 25th, 26th,  
27th.  
Aug. 5th.

**WILLIAM STEVENS** by his Will, dated the 28th of December, 1776, gave to his brother *Thomas Stevens* one quarter of the residue of his estate and effects: *one* vested in Prize before condemnation: but upon condemnation it is considered the property of the captor from the time of the capture.

The Crown in prize-grants puts what is strictly bounty upon the footing of right; considering the claim as transmissible to the legal representatives of the claimant, deceased before the grant; subject to his Will, &c., as his other property.

Probate of the Will of a married woman, which is now necessary, though formerly otherwise, limited to her power, by the assent of her husband, with respect to any beneficial interest: not, as to her right, as Executrix of another person, to make an Executor, and continue the representation.

Assignment to Navy agents of part of the subject of a Prize suit, then depending, void; amounting to Champerty: viz. the unlawful maintenance of a suit in consideration of a bargain for part of the thing, or some profit out of it; which is not confined to Courts of Common Law.

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 v.  
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to the Plaintiffs *Lawrence William Stevens* and *Sarah Burt*, then *Stevens*, one other quarter; to be divided between them, share and share alike; when they should severally attain the age of twenty-one; or to the survivor of them; but, if both should die under that age, the testator gave the said quarter to his brother *Thomas Stevens*; and all the rest and residue of his estate and effects he gave to his sister *Sarah Pearce*, then the wife of *Richard Pearce*; and appointed her his executrix.

The testator died in *December*, 1782. In *July*, 1781, having been appointed commander of his Majesty's sloop *The Nymph*, he was concerned in the capture of the *Dutch Fort Chinsurah* in the *East Indies*. A suit in the Admiralty Court, upon the legality of that capture, and the distribution of the prize money, was depending at the time of the deaths of the testator Lieutenant *Stevens* and of *Richard* and *Sarah Price*.

*Marsh* and *Creed*, agents for the captors, executed a bond dated the 19th of *December*, 1783, in the penal sum of 10,000*l.*; reciting an agreement by them, in consideration of having one fifth part of the money, that might be recovered for *William Stevens's* share, to indemnify *Richard* and *Sarah Pearce* from all costs and charges, that they might be liable to pay on account of any suit or appeals that might be brought, carried on, or prosecuted, touching the said prize money; if such prize money should not be recovered; and reciting an assignment to *Marsh* and *Creed*, their executors, &c. of the same date, by *Richard* and *Sarah Pearce*, of one fifth part of all such prize money, &c. that was, or should, or might become, due to the estate of *William Stevens*; with condition to be void, if *Marsh* and *Creed*, their heirs, executors, &c. should indemnify *Richard* and *Sarah Pearce*, their heirs, executors, &c. and also the estate

estate and effects of *William Stevens*, from payment on account of any action, &c.; and, in case *Marsh* and *Creed* should recover or receive such prize money, within thirty days to account for and pay unto the said *Richard Pearce* and *Sarah*, his wife, their executors, administrators, or assigns, or such person or persons as should then be the legal representative or representatives as to the personal estate of the said *William Stevens*, four fifths of all such sums as should be recovered, &c.

*Thomas Stevens* died in *December*, 1787; having by his Will, reciting his expectation of receiving a considerable sum under the Will of his late brother, in case such sum should be received by his executors, disposed of it between the Plaintiffs *Stevens* and *Burt*.

*Richard Pearce* by his Will, dated the 23d of *January*, 1789, after giving some legacies, bequeathed the rest and residue of his monies and securities for money and all his estate and effects whatsoever and wheresoever, after payment of his debts, &c. unto his wife *Sarah Pearce*, to and for her own use, benefit and disposal; and in case of her decease in his life-time, then he gave and bequeathed all the said residue of his estate and effects to the executors or administrators of his said wife; and he directed that the same shall be paid, transferred and divided, unto and amongst such person and persons, and in such proportion, manner, and form, as his said wife by her last Will and Testament in writing, or any writing, purporting to be her last Will and Testament, and to be executed by her either in his life-time or after his decease, should give, direct, or appoint, the same: it being his will and intention, that, in case his said wife should die in his life-time, or before he should alter his said Will, then that the residue of his estate and effects, to her thereby given, should go unto, and be paid and applied,

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plied, as his said wife should by her Will, or any writing, purporting to be her Will, have directed; and he thereby authorized and empowered his said wife in his life-time to make any such Will for the purposes aforesaid; and he appointed *Catherine Pearce*, afterwards *Wilkinson*, and the Defendant *Bagwell* his executors.

*Richard Pearce* died on the 28th of February, 1789. His wife survived him only twelve hours; having made her Will, of the same date with her husband's, and signed by him, as an attesting witness; reciting his Will; and in pursuance of the power, thereby given to her, and all other powers, &c. as to such worldly estate and effects, whereof she might be entitled or possessed at the time of her decease, or over which she had any disposing power, she gave, directed and disposed, thereof, after bequeathing various pecuniary legacies, in the following manner:

"As to all the rest, residue and remainder, of my  
 "estate and effects, whatsoever and wheresoever, and  
 "of what nature, kind, or quality soever, whereof I  
 "may be possessed, interested, or entitled unto at the  
 "time of my decease, or over which I have any power  
 "to dispose either by the Will of my said husband or  
 "by or under the Will of my late brother *William Ste-*  
 "vens, formerly a Lieutenant in his Majesty's navy,  
 "but now deceased, and in whose Will I am named the  
 "residuary legatee, or by any other means whatsoever,  
 "after payment of my just debt, funeral expences,  
 "and the charges of proving this my Will, I give, be-  
 "queath, dispose and direct, the same and every part  
 "thereof unto the said *Catherine Pearce*, her executors  
 "and administrators, to and for her and their own use  
 "and benefit;" and she appointed *Catherine Pearce*  
 and *John Bagwell* executors. The Plaintiffs *Stevens* and  
*Burt*,

*Burt*, and *Susannah Scammell*, deceased, were her next of kin at the time of her death.

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In *March*, 1789, probate was granted of the Will of *Sarah Pearce*; but limited to all the right, title, and interest, of her *Sarah Pearce* in and to the residue, which by the Will of her husband she had a power to dispose of, and had disposed of by her said Will accordingly. In *May*, 1800, *Catherine Wilkinson*, formerly *Pearce*, and *Bagwell*, instituted a suit in the Ecclesiastical Court against the Plaintiffs in this cause, *Stevens* and *Burt*, and *Susannah Scammell*, as next of kin of *Sarah Pearce*; citing them to shew cause, why the limited probate should not be revoked, and a general probate be granted; but in *Easter Term*, 1801, a prohibition was granted by the Court of King's Bench (46); and administration of the goods, &c. of *Sarah Pearce*, of which notwithstanding her said Will she died intestate, was, upon the 29th of *January*, 1803, granted to the Plaintiff *Stevens*.

In *January*, 1805, the limited probate was revoked; and a more extended probate granted; limited not only to all the right, title, and interest, of *Sarah Pearce* in the residue, under the Will of her husband, but also to the power, which she had of making a testament, and appointing executors of the goods; &c. which she had, as executrix of *William Stevens*.

In 1791 a decree of condemnation of the property captured at *Chinsurah*, was pronounced in the Court of Admiralty, as prize; to be distributed in such manner as his Majesty should think fit; which decree was, in 1792, affirmed on Appeal.

In

(46) *Scammell v. Wilkinson*, 2 *East*, 552.



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In 1703 a warrant was granted by the Commissioners of the Treasury for payment of one moiety of the proceeds to Sir *Edward Hughes* and the officers and crew of *The Nymph*, or to their agents, lawfully authorized and appointed; to be distributed in the established proportions. Another warrant, dated the 12th of *July*, 1796, ordered the payment to be to the representatives of Sir *Edward Hughes* and to the officers and crew of *The Nymph*. Under those warrants *Bagwell* received from *Marsh* and *Creed* four fifths; and paid to the executors of *Thomas Stevens* the fourth, intended for him by the Will of *William Stevens*.

A third warrant of the Treasury, dated the 17th of *December*, 1803, ordered the payment, directed by the former warrants, to be made to the representatives of Sir *Edward Hughes*, the representatives of *William Stevens*, and the representatives of such of the officers and crew of *The Nymph* as were deceased, conjointly with the survivors; to be distributed in the manner directed by the two former warrants.

The Bill prayed, that the Plaintiffs, as the only next of kin of *William Stevens* and of *Sarah Pearce* at the determination of the suit in the Court of Admiralty, and at the time of granting the Treasury warrants, and as the legatees in the Will of *Thomas Stevens* and *Susannah Scammell*, may be declared entitled to the whole of the prize money of *William Stevens*; and that the assignment of *Marsh* and *Creed* may be declared void.

The answer of *Bagwell* submitted; that the administration, granted to the Plaintiffs, did not comprehend any property, which *Sarah Pearce* was entitled to under the Will of *William Stevens*, but merely such as she became entitled to in her own right, after the decease of her husband;

husband; and that under the extended probate the property of *William Stevens* became vested in the executors of *Sarah Pearce*, for the purposes of her Will, and not for her next of kin.

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Sir *Samuel Romilly*, Mr. *Bell*, and Mr. *Girdlestone*,  
for the Plaintiffs.

The propositions, maintained by this Bill are, 1st, That the representatives, under the warrant, granted by the Lords of the Treasury, were the next of kin, entitled by the Statute (47): 2ndly, the moiety of the residue, taken by *Sarah Pearce* under the Will of her brother Lieutenant *Stevens*, was not disposed of by her; and her next of kin therefore are entitled; as in a case of intestacy: 3dly, that the assignment, obtained by the agents, of a fifth part of the prize money is not a valid assignment.

With respect to the first point Lieutenant *Stevens* was not possessed of this property even at the time of his death. He had no interest, but at the utmost, an expectation, that the Crown would grant to him a share of that, which was vested entirely in the Crown: to be received, as a bounty: not claimed as a right. Until the warrant issued from the Treasury, there was no property any where but in the Crown. Then, the construction of that warrant, to pay to "the representatives" of Lieutenant *Stevens*, must be, as in the case of *Bridge v. Abbot* (48), the next of kin, at that time.

If that should be determined against the Plaintiffs, then, with regard to the next point, the Spiritual Court, and the Court of King's Bench (49), granting the prohibi-

tion,

(47) Stat. 22 & 23 Ch. II, (49) *Scammell v. Wilkin-*  
c. 10. son, 2 East, 552.

(48) 3 Bro. C. C. 224.

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tion, have decided, that the Will, made by Mrs. *Pearce*, has disposed of, not all her personal estate; but only what she had the power by the Will of her husband to dispose of; or what she took as executrix of her brother. The moiety of the residue, bequeathed to her by the Will of her brother, does not fall under either of those descriptions. Her husband had no power to dispose by Will of that, which was the *Chose in Action* of his Wife, not reduced into possession. Of property, to which she was entitled as executrix, she was merely a trustee for other persons. As to that she is considered to all intents and purposes a *fême sole*: her disability, calculated for her protection, not prevailing to the injury of other persons. The testator invests her with all the power, which he himself had; and would give to any other person; and the form of the probate in such cases, shews, that it is so considered. She was therefore not entitled to dispose of that portion of the residue of her brother's personal estate, which she took, not as executrix, but absolutely; as her own property; as residuary legatee.

3dly; As to the assignment of one fifth part of this fund to the agents, there is no case precisely like this: but it is within the general principle of public policy. There is no doubt, that a solicitor, or general manager and agent, would not be permitted to take from the client an assignment of a portion of the property in dispute in consideration of an indemnity against the costs; and the Court will regard with great strictness such a transaction between prize-agents, and the persons, entitled to the prize: persons necessarily kept long in suspense; and always considered as entitled to the peculiar protection, not only of Courts of Justice, but of the Legislature also. A prize-agent stands in a confidential situation; which excites the greatest jealousy of a transaction, by which he takes an assignment of any beneficial interest

interest from those persons, whose concerns are entrusted to him. This appears a most extraordinary bargain: for a fifth of the whole of this very considerable property: the share of Lieutenant *Stevens*, after all deductions, exceeding 20,000*l.*: the agents deducting, 1st, their commission, upon the whole, to which he was entitled; to the amount of 4,677*l.*; then their Bill for disbursements, &c. 6,512*l.*; and after those deductions taking under this assignment of a fifth part of the balance 4,092*l.*; aware, that they were acting for an executrix, entitled to a moiety of the property. It could not affect the fund farther than she was beneficially entitled: but upon the general principle such a transaction cannot possibly stand in a Court of Equity.

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Sir Arthur Piggott, Mr. Alexander, and Mr. Finch;  
 Mr. Richards, Mr. Thomson, and Mr. Clason;  
 Mr. Hart, and Mr. Raithby; for the different  
 Defendants.

The last of these three grants cannot affect the rights, acquired under the two preceding grants; the effect of which is, that the proportion of Lieutenant *Stevens* in this prize money became his personal assets. By the first grants the power of the Crown was exhausted; except to supply a defect in form; to give farther effect to the grant; but a new grant, inconsistent with the former, could not be made. The argument is raised merely upon the word "representatives" in the last grant; by analogy to testamentary cases and the doctrine of lapse. The proposition of the Defendant is, that Lieutenant *Stevens* at the time of his death had an interest, if ever effect should be given to it by the Crown, constituting a part of his personal estate: an insurable interest, in respect of the qualified property in the captors at the time of the capture: so that the underwriter

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could not maintain the defence, that the property was in the Crown. The captors have an inchoate, equitable, claim upon the bounty of the Crown, to a reward for the capture: a claim, though certainly not capable of being enforced in a Court of Justice, sanctioned by all experience; and in no instance disappointed. Such an interest is assignable; and is assets for debts. Though, as against the Crown, no legal interest passes, until the grant is made, yet, when made, it has relation to the time of the capture. The doctrine of lapse and testamentary cases has no application to this subject; and the Court of Exchequer in the case of *Ebans v. Charles* (50), if they did not shake the authority of *Bridge v. Abbot*, did not advance it; and the circumstances of that case were singular. The conclusion is, that the grant was intended for the person, sustaining the character of representative of Lieutenant *Stevens*, subject to the trusts of his Will: to realize to him and his representatives the expectation of so many years. Can it be supposed, that the Crown, making this grant, intended to exclude the creditors? Other consequences of the Plaintiff's construction cannot correspond with the intention of the grant; as, that the father should *Jure Representationis* exclude brothers and sisters; that a married woman, answering the description of sole next of kin, might carry the property to a stranger from other relations.

2d. Upon the 2d point, that *Sarah Pearce*, a married woman, died, without having made any Will, except during her coverture, and therefore intestate, the Will she made is a good Will for the purpose of passing all her interest under the Will of her brother. By that Will she not only executes the power, given to her by the Will of her husband; but goes farther; and to that excess she has his assent;

assent; which is all, that is required to give effect to the will of a married woman. His assent, which might have been expressed by parol, is confirmed by his signature: a specific assent to that Will. If he had survived, he could not have claimed the property. His assent was necessary only with regard to his interest. As to any thing, which she held in *auter Droit* she might make a Will, and continue the representation, without his assent. It was not necessary for her, having survived, to make a new Will; merely to give the property to the same persons. The Will she had executed, with the assent of her husband, was sufficient. The subject of her disposition was not ascertained: but it was her interest under her brother's Will; which under the subsequent grants from the Crown she took with the other residuary legatees.

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3dly. As to the transaction with the agents, this Bill was filed, after the money, received from them, had been distributed. The rule, derived from principles of public policy, controuling the relations of guardian and ward, attorney and client, principal and agent, has not been farther extended (51). The objection to this transaction would reach any bargain, even for Commission, by anticipation. The Commission, stipulated for by the great factors of *London*, including the Commission *del Credere*, in the shape of indemnity against failure, is part of the produce of the sale. This is no more than an insurance against the consequences of a suit, considered hazardous, in which Mr. and Mrs. *Pearce* were engaged. The principle, protecting a client, is confined to the case of a law agent, conducting a suit; who, having the means of throwing obstacles in the way, is strictly watched; and is not permitted to take more than his ordinary fees.

*The*

(51) See *Huguenin v. Baseley*, ante, Vol. XIV, 273.

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*The MASTER of the ROLLS.*

Is not this what the law calls Champerty: a bargain for part of the subject, for which the parties are litigating in a Court of Justice?

For the Defendants.

It is no more than a bargain with an agent for indemnity against the costs; which does not fall within the description of Champerty. These persons were the general agents for the captors: not the particular agents of *Pearce* and his wife. In that respect this cannot be compared with the general case of Attorney and Client: nor can a suit, of such a nature, between such parties, the Crown on one side, and the *East India Company* on the other, be compared to a suit between private individuals; upon which the offence of maintenance or champerty might be incurred. Unless such persons as these agents had come forward, none of these parties would have had any thing to contend for.

Sir *Samuel Romilly*, in Reply.

The cases of insurable interests, from *Le Cras v. Hughes* (52) to *Lucena v. Craufurd* (53), turn upon the peculiar nature of such interests. The case of *Bridge v. Abbot* (54) is as near this as can be; and that authority has never been shaken; and is always mentioned with approbation. It certainly is very difficult to reconcile *Evans v. Charles* (55) with that case, or with principle. The probate of the Will of Mrs. *Pearce* cannot pass the property, taken under the grant of the Crown, not under her husband's Will. The reason of granting the probate of property, which she took as executrix, the interest of other

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(52) *Park Ins.* 260.

(53) 3 *Bos. & Pul.* 75.

(54) 3 *Bro. C. C.* 224.

(55) 1 *Anstr.* 128.

other persons, for whom she is to act, does not apply to property which she took for her own benefit.

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As to the assignment, it is impossible, that such an instrument can stand in a Court of Equity. In justice and conscience such exorbitant terms are not to be defended. The transaction is directly that worst species of maintenance, called Champerty; a contract to carry on a suit upon the terms of receiving a certain portion of the property, which is in dispute, if it shall be recovered. That is an offence at Common Law; not by Statute. If this assignment could be considered legal, this property did not pass by it. At that time *Stevens's* representatives were not entitled to any thing. The suit failed: the sentence was against them: but afterwards the Crown made a gratuitous gift instead of what under other circumstances they would have been entitled to. The intended subject of the assignment never existed: but another thing, derived from the bounty of the Crown, was substituted in its place.

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*The MASTER of the ROLLS.*

The question in this cause is, to whose benefit the grant, made by the Crown, of the *Chinsurah* prize-money is to emure: whether for the benefit of the residuary legatees under the Will of Lieutenant *Stevens*, or of his next of kin; and, if for the benefit of the latter, whether of the next of kin at the time of his death, or of those, who answered that description at the time of the grant.

Aug. 5th.

The capture of the Fort of *Chinsurah*, in July, 1781, was made by *The Nymph* sloop of war, commanded by Lieutenant *Stevens*, under the orders of Sir *Edward Hughes*,

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*Hughes*, and by a detachment of the *East India Company's Forces*. If the captured effects had, after the death of Lieutenant *Stevens*, been condemned as prize to the captors, there can be no doubt, that his share would have passed by his Will; as, though the property was not completely vested in the captors until condemnation, yet after condemnation it is by relation considered as theirs from the time of the capture. The captured effects being condemned to the Crown, no right to any part of the produce can accrue to any one, except by the gift of the Crown; and, as Lieutenant *Stevens* died, before any gift was made, his Will could have no direct operation upon the subject of that gift. But the intention of the Crown in all cases of this kind is to put what is in strictness matter of bounty upon the footing of matter of right. The service performed is thought worthy of reward; and, though the party performing it, died before payment, the claim of bounty from the Crown is considered as transmissible to his representatives in the same plight and condition as the claim for wages, or any other stipulated or legal remuneration of service. In such cases the Crown never means to exercise any kind of judgment or selection with regard to the persons to be ultimately benefited by the gift. The representatives, to whom the Crown gives, are those, who legally sustain that character: but the gift is made in augmentation of the estate; not by way of personal bounty to them. They take subject to the same trusts, upon which they would have taken wages, or prize money, to which the party, from whom they claim, might have been legally entitled.

The representatives of Lieutenant *Stevens* were therefore entitled to receive this money; but upon the same \* trusts as they would take his general estate; and this is to be considered, as if it had been actually a part of his property

property at the time of his death. The consequence is, that his residuary legatees were entitled to it.

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As I hold this to be constructively, and for the purpose of regulating the trust upon the grant of the Crown, his property at his death, it follows, that the right to the shares of those residuary legatees, who died after him, and before the money was received, must be regulated upon the same principle. His representatives must distribute this fund just as they would have been bound to distribute any other money, legally due to his estate, that they might have received, when this grant was made: consequently the share of *Thomas Stevens* will be governed by the disposition made by his Will.

A question arises with regard to the effect of this principle as to *Mrs. Pearce's* share of the residuary estate. It is contended on the one hand, that it is to go according to her Will: on the other, that it belongs to her next of kin. The Court considers that instrument only, of which probate has been granted, as her Will; for, though formerly it was held, that the Will of a married woman, not only need not, but ought not, to be proved, and that the probate was of no authority, yet it is now settled, that neither Courts of Law, nor Courts of Equity, will act upon such Will, if it has not been first proved in the Ecclesiastical Court. In *Stone v. Forsyth* (56) Lord *Mansfield* says, if the Ecclesiastical Court will not grant probate, the remedy is an appeal to the Delegates.

My opinion is, that the Will of *Mrs. Pearce*, as proved, would not have affected her share of the actual residuary estate of Lieutenant *Stevens*; and consequently I cannot adopt it as the rule for guiding the trust of that, which

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which I hold was only constructively part of his residuary estate. She was married, when her Will was made. Her husband had bequeathed to her all the residue of his property, and upon her death to her executors; and empowered her to make a Will, or writing purporting to be a Will, as to that residue. Mrs. *Pearce*, professing to act upon and under that authority, made a Will: but by that Will she disposed, not only of what her husband had given to her, his residuary estate, but also of all the rest, residue, and remainder, of her estate and effects, whatsoever and wheresoever, and of what nature, kind, or quality, soever, whereof she might be possessed, &c. or over which she had any power to dispose, either by the Will of her husband, or under the Will of her brother, or by any other means whatsoever.

In *March*, 1789, a *limited* probate of that Will was obtained from the Spiritual Court. The Probate, which issued, was limited to the right, title, and interest of her *Sarah Pearce*, in and to the residue, which by the Will of her husband she had a power to dispose of, and hath disposed of by her Will accordingly.

It is observable, that the Spiritual Court take no notice of, and place no reliance upon, the circumstance, upon which some stress was laid in the argument: viz. that her husband was one of the attesting witnesses to her Will. They refer only to the authority she derived from his Will; and limit the *Probate to the interest which she took under that Will*. They do not grant the Probate even to the extent of the nomination, which she had made, of executors; no notice is taken of that nomination.

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Her executors, dissatisfied, as it seems, with this limited Probate, applied for a general Probate. An application

plication was made to the Court of King's Bench for a prohibition (57). It was there held, that the Spiritual Court ought not to grant a general Probate: but the Court thought, the Probate granted was *more limited than was necessary*; for they say (58) that, as Mrs. Pearce, besides what she could dispose of by the Will of her husband, to which the limited Probate is confined, had a power to make a testament, and appoint an executor, of the goods she had as executrix, to which that Probate does not extend, the Probate, to be granted in this case, may be more extensive than what the Plaintiffs insist it should be.

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v.  
Bacwell

After that decision *Lawrence William Stevens* applied to the Ecclesiastical Court for the administration of such of the effects of *Mrs. Pearce* as did not pass by her Will; which was granted. He applied also for administration to the estate of *William Stevens* with the Will annexed; contending, that in the event, which had happened, *William Stevens* had now no personal representative. This demand was resisted by the executors of *Mrs. Pearce*; and their Proctor denies, that there is not now any representative of *William Stevens*; as his said party, viz. the executors of *Mrs. Pearce's* Will, are at present the personal representatives of *William Stevens*.

After much pleading and contention, the sentence rejected the petition of the Proctor for *Lawrence William Stevens*; praying administration to Lieutenant *Stevens's* Will; and made this addition to the former Probate of *Mrs. Pearce's* Will: viz. so far as respected the power she had of making a Testament and appointing executors. As to *William Stevens* the Court of King's Bench thought, \* the power of continuing the representation vested in her by law without any authority from her husband; and to that

[ \* 156 ]

(57) *Scammell v. Wilkinson*, 2 East, 662.

(58) 2 East, 648.

1808:  
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 v.  
 BAGWELL.

that power the Ecclesiastical Court refer; for her husband had not professed to give it to her.

My opinion is, that this Will of her's had no operation whatsoever, except to pass what she took under her husband's Will, and to transmit the representation to *William Stevens* to her own executors: that is, it passed the legal rights, but not the beneficial interest she had under that Will, as *residuary legatee*. Her right therefore in that respect passes, as if she had died *totally intestate*; viz. to her next of kin at the time of her death; and, upon the principle I before laid down, the same next of kin are entitled to that; which I hold to be constructively of the nature of residuary estate.

This disposes of all the questions; except that touching the agreement of Mr. and Mrs. *Pearce* with *Marsh* and *Creed*. I expressed at the hearing my opinion, that the agreement was void from the beginning; as amounting to that species of maintenance, which is called Champerty; viz. the unlawful maintenance of a suit in consideration of a bargain for part of the thing, or some profit out of it. In the case of *Wallis v. The Duke of Portland* (59) Lord *Loughborough* held, that this offence is not confined to Courts of Common Law. Independently of the illegality of this agreement, the case has not existed, in which the agreement was to take effect; as the property has not been recovered in that suit. The captors failed: the Decree was against them; and the property has been derived from a different source, and under a different title. The right to the property therefore either way is totally unaffected by this agreement; and must be declared according to the opinion, that I have delivered.

In

(59) Ante, Vol. III, 494; post, XVIII, 120. *Hartley* see 502. *Wood v. Downes*, v. *Russell*, 2 Sim. & Stu. 244.

In *Easter Term*, upon the death of Mr. Justice ROOKE, Mr. Justice LAWRENCE resigned his seat in the Court of King's Bench, and was appointed a Judge of the Court of Common Pleas.

Serjeant *Bayley* was appointed a Judge of the Court of King's Bench.

Mr. *Manley*, Mr. *Pell*, and Mr. *Rough*, were called to the degree of Serjeant at Law.



LE TEXIER v. THE MARGRAVINE OF ANSPACH.

1808.

June 22d, 25th.

**S**INCE the former decision in this case (60) the suit, being abated by the death of the Defendant, the Margrave of *Anspach*, was revived against the Margravine, as his executrix; and the demurrer, which had been allowed, was set down to be re-argued.

Demurrer by a married woman to a Bill, praying discovery only against her, and relief against her husband, as to contracts, &c. by her, as agent for her husband; [\*160] husband; alledging the vouchers, &c. to be in her possession; allowed upon the objection, first, to making a mere agent a party: secondly, to admitting the testimony of a wife in her husband's cause.

Mr. *Hart* and Mr. *Raithby*, for the Plaintiff.

The answer of the Margrave admits distinctly, that in all the transactions, stated by the Bill, he authorized the Margravine to act for him; constituting her his agent. The facts, alleged by the Bill, and which must be considered as admitted by the demurrer, were in the personal knowledge, not of the Margrave, but of that agent, to whom he had delegated the power to act for him; and for whose acts he was responsible. The first question is, whether a Plaintiff seeking relief, arising out of transactions with an agent, against the principal, may join in the bill, praying a discovery, the agent; within whose personal knowledge alone the transactions rest; considering the agent for this purpose, not as the wife of the principal, but as a stranger. An agent, it is true, may be a witness: but it is not a necessary consequence, that the Plaintiff is bound so to treat him; and cannot make

him

(60) Ante, Vol. V, 322; see the note, 329.



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of ANSPACH.

him a party for the purpose of discovery. The Plaintiff may take the course, most conducive to justice; depending upon the establishment of facts within the knowledge of that person. At law the Plaintiff, reading the answer, must read the whole: using the party as a witness, he must consider him so throughout: but he may use the discovery; subject to all the suspicion, that naturally attaches upon the evidence of a party.

Another objection will arise upon the character of this Defendant; that a wife cannot bind her husband; or be a witness against him. The reason of our law upon the former point is, that by the marriage all her rights and authorities are absorbed: he is supposed to transact for both: but if the fact is otherwise, if he constitutes her his agent, the reason failing, the law must be different; and he must be bound by her acts; as if he had employed a stranger. The principle, upon which she cannot be a witness against him, is his right: a privilege, that he may relinquish; which, calculated for his convenience, cannot deprive him of the power to transact by an agent, deliberately constituted by him. This species of agency, though it may not have the authority of decision, or even the countenance of *Dicta*, is the subject of daily experience: men going abroad; and leaving Powers of Attorney with their wives to act in their absence: not to do the ordinary acts, that occur in every family; as to which a distinct assent to each transaction is supposed; but to sell estates; execute conveyances; and to do acts, the effects of which may amount to a disposition of his whole property. Though she cannot be called, as a witness, to prove such acts, within her knowledge, she may in equity be compelled to make a discovery: otherwise what a snare may be laid for those, who deal with her: if by concealing facts, which she is bound to communicate, she

can

can enable her husband to say, he knows nothing upon the subject. The effect of shutting out her discovery, must, as Lord *Rosslyn* observes, be a total failure of justice; her agency being permitted to the extent of binding the parties, who may have dealt with her, and of obtaining from them a disclosure of the circumstances; her coverture on the other hand protecting her, and through her the husband.

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LE TEXIER  
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MARGRAVINE  
of ANSPACH.

*Sir Arthur Piggott, Sir Samuel Romilly, Mr. Leach,*  
and *Mr. Dowdeswell*, in support of the De-  
murrer.

The rule is established, that an agent cannot be made a Defendant; except in the case of a Company; or, where in a case of fraud the agent is so involved in the fraud; that the Court can make him pay the costs: in any other case the agent may demur. If an instance could be produced of an agent, in general, made a Defendant, and submitting to answer, it would not be an authority in the instance of a wife; who cannot be a witness, either directly or indirectly, in her husband's cause: not for him; on account of her strong bias: nor against him; as it was thought right, with reference to the general interest of society to guard, even at the expence of the failure of justice, against the unfortunate consequences, to which \* that might lead. No interest of this Defendant was to be affected by this Bill: no fraud as charged: nor any consequential relief prayed against her upon that agency. What use could have been made of her answer against the Margrave? If they had answered jointly, the whole answer must be read at law; which would overturn the general principle. The representation of the bill is only; that the contracts, which took place between the Plaintiff and the Margrave, were effected principally through the agency of the Margravine; several contracts in writing being signed by the Margrave; and simply praying an

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account upon those facts alleged. This is the first instance of an attempt to make a married woman a party to a bill to establish a demand against her husband upon alleged agency. She answers separately only under special circumstances, and for her advantage. The law protects her from liability to answer upon oath. Her separate defence is allowed as a shield for her benefit; where she has a separate interest; not imposed upon her as an obligation. All the cases are enumerated by Lord *Redesdale* (61). This mode of dealing, through the agency of a wife, is not new. Many trades are carried on entirely in that manner. If this Plaintiff is entitled to this discovery, so is every tradesman against any married man; upon the mere allegation, that his wife was an agent; that she had rendered accounts; possessed vouchers; &c. The husband suffers all the inconvenience, that may arise from the want of her testimony. He must prove his case by other witnesses. The inconvenience and disadvantage are therefore mutual; arising from the general principle of law; standing upon the soundest policy; and not to be broken in upon; and every person, dealing with another through the agency of his wife, is bound to know, that he is transacting with a person, who cannot be a witness: the policy of the law protecting the husband against her testimony; as it denies him the advantage of it. The want of authorities upon this subject is decisive; as such cases must occur frequently; men going abroad; leaving the sale of their estates, the management of their trades, and general concerns, to their wives. In such cases persons, contracting with them, must prove their transactions by other means; unless fraud is alleged; in which case a separate answer may be compelled; *Rutter v. Baldwin* (62).

Mr,

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(61) *Mitf.* 95.

(62) 1 *Eq. Ca. Ab.* 226.

Mr. Hart, in Reply.

This is not a question upon the general principle; which is admitted: but the particular circumstances create the exception. The husband, giving this authority to his wife, relinquishes the protection of the general rule. The case of *Rutter v. Baldwin* proves, that circumstances may exist, in which the wife may be made a witness, or a party, to bind her husband. That case, the circumstances of which were very particular, was decided upon this ground; that the effect would be a fraud upon the party; who in consequence of what had passed between the husband and wife, had dealt with her as a *Fême Sole*. Though this Defendant did not appear as a *Fême Sole*, the positive declaration of the husband, that the Plaintiff may deal with her, as with him, is equivalent; and the effect of that representation is fraud; if this objection prevails: the wife, having thus obtained all the vouchers, a fact admitted by the demurrer, refusing all discovery; and the husband stating, that he has no knowledge upon the subject.

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of ANSPACH.

The Lord CHANCELLOR.

This case, as it is represented upon the record, is very singular. As it now stands, the decision upon the demurrer must be precisely on the same ground, as when it was formerly argued. It is difficult to account for the supposition, that the validity of the demurrer could be affected by any answer, that might be put in by the husband, after that demurrer; as the Court, considering, how a demurrer is to be disposed of can look only at the bill and the demurrer. The bill, filed against both the husband and the wife, has this singularity; though I do not say, other instances may not have existed; that it prayed both discovery and relief against the one, and prayed no relief against the other. I give no judgment,

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 of ANSPACH.
 The only case,
 in which a per-
 son, against
 whom no re-
 lief is prayed,
 is allowed to
 be made a
 party, is that
 of the agent of
 a Corporation.
 Where an
 agent is so
 involved in
 a fraud, that
 the Court will
 charge him
 with costs,
 though relief
 can-
 not be [*165]
 prayed against
 him, yet, if the
 costs are not
 prayed against
 him, a Demur-
 rer lies.

what would have been the effect, if the bill had prayed a delivery to the Plaintiff of those vouchers; which are charged to be in the hands of the wife: it is however simply, as far as relief goes, a bill against the husband only; and, against the wife, a bill for discovery only. The consequence is, that, independent of her character, as wife, the case must be considered as one of those, in which the Court does sometimes allow persons to be made parties, against whom no relief is prayed; and the only case of that kind is that of the agent of a Corporation (63).

Where an attorney, or other agent, is so involved in the fraud, charged by the bill, that, though a re-conveyance, or other relief, cannot be prayed against him, a Court of Equity will, rather than that the Plaintiff shall not have his costs, order that agent to pay them, if he is made a party, the Plaintiff must pray, that he may pay the costs: otherwise a demurrer will lie. In the instance of a Corporation the observation has been frequently made, that the Court seems to have made somewhat of a stretch; in order that there should not be a failure of *justice: but, before a married woman can be made a party, as an agent, upon the same principle that the agent of a Corporation is made a party, other principles must be broken through, long acknowledged by the Law; arising out of the relation of husband and wife: a case, in which it is almost impossible to represent the degree of inconvenience, that will result from the adoption of this principle; and the particular mischief must be met with the observation, that it must be endured, rather than that a general mischief should be introduced; which
 is

(63) Ante, *Dummer v. The Corporation of Chippenham*, Vol. XIV, 245. See *Cartwright v. Hateley*, I, 292, and the note, 293.

is against all policy ; and would break in entirely upon the happiness of private life.

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The reasoning in *Wych v. Meal* (64), the case of the officer of a Corporation, will not apply to the case of a wife, made a party, for the purpose of discovery, as agent to her husband. In the former case there is the answer of a party, who may be converted into a witness : but in the case of the wife you are met directly by the other principle, arising from her character. Her answer cannot lead to her examination, as a witness. The case of this Defendant therefore cannot be compared to that of the agent of a Corporation ; nor to the case of an agent, against whom costs are prayed : no relief, of that or any other description, being prayed, or capable of being maintained, against her.

The next consideration is, whether upon the particular circumstances of this case the wife ought to be, not a witness, but a party. I have great difficulty to accede to the case of *Rutter v. Baldwin* (65) ; unless I could a little more understand the circumstances. Whether it is meant to intimate, that the wife herself was to be a witness to prove, that the husband concealed the marriage, * with the view of enabling her to deal with the world ; or, that being established by legitimate evidence of other witnesses, she was to prove herself an agent, and that she did the acts, as such, I doubt the policy of admitting her evidence, even to that extent. That case however is a direct authority for the general proposition, that she cannot be a witness ; that her answer cannot be read ; unless the husband has permitted her to deal, as if she was a *fême sole* ; not acting on the part of her husband, in the character of his wife. That principle does

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(64) 3 *P. Will.* 310.

(65) 1 *Eq. Ca. Ab.* 226.

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**LE TEXIER**  
 v.  
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**of ANSPACH.**

does not apply to the present case: the Bill distinctly stating, that this Defendant held herself out, and was held out by the late Defendant, as his wife, from beginning to end.

Attending therefore to the circumstance, that no relief is prayed against the wife; without saying, what would be the effect, if there had been a prayer, that the vouchers should be delivered up by her; but observing, that she was made a party merely for discovery; which is of no use; unless she can be made a witness, and the discovery can be used as her testimony against her husband; and a great principle of public policy forbidding, that she should be a witness for that purpose; as the Bill prays no relief against her, my opinion is, that she is not a proper party to the Bill, as a Bill for Discovery by her, as a witness: a character, which she cannot sustain against her husband ( 66 ).

[ \* 167 ]

Another circumstance in this case requires consideration. I doubt very much, whether the judgment upon this demurrer, supposing it wrong, could be set right at this time. If her answer to a mere Bill of Discovery could be read, could she be examined as a witness now; to what would be contained in that discovery; if, instead of rectifying the error earlier, the Plaintiff had proceeded to examine witnesses, and pass publication? Is not that a \* waiver, or an acquiescence? It is not however necessary to put the decision upon that; as upon this form of the record I think the demurrer ought to be allowed; with the observation, that it ought to have been allowed earlier.

(66) *Barron v. Grillard*, 3 Ves. & Bea. 165.

ST. PAUL v. VISCOUNT DUDLEY AND WARD.

1808.

June 29th.

**JOHN**, late Viscount *Dudley and Ward*, was under the Will of his father seised of the manors of *Sedgley* and *Kingswinford* for life; with remainders to the devisor's younger son, the Defendant *William Lord Dudley and Ward*, and to his first and other sons in the usual course of settlement; and the ultimate remainder to the devisor's right heirs.

Copyhold premises, purchased by the Lord, tenant for life of the Manor, with remainders over, taking the surrender to him and his heirs, merge; and, as parcel, are subject to the limitations, of the Manor; and, though under a cove-

On the 30th of *May*, 1775, in pursuance of an agreement by *John Lord Dudley and Ward* to purchase copyhold lands, situated within the manor of *Sedgley*, *Jonas Clarke* and *Ann*, his wife, surrendered to the use of *Lord Dudley and Ward*, his heirs and assigns, for ever.

nant by the purchaser to surrender them by way of mortgage to the mortgagee and his heirs he could compel a regrant by the remainder-man, no regrant having been made, the general devisees of the purchaser have no equity.

By articles of agreement, dated the 12th of *June*, 1779, *Thomas Newton* covenanted in consideration of 1500*l.* to convey freehold lands within the manor of *Kingswinford*, and to surrender copyhold premises, to the use of *Lord Dudley and Ward*, his heirs and assigns, for ever; which conveyance and surrender, &c. were made accordingly. *Lord Dudley and Ward* was never admitted to the copyhold lands which he had purchased. By indentures, dated the 25th and 26th of *January*, 1781, he conveyed freehold lands, and covenanted to surrender the copyhold premises, which he had purchased, within the manor of *Kingswinford*, to the use of *Jacob Smith* and his heirs; to secure the re-payment of 8000*l.*, advanced by *Smith*; subject to a proviso for re-conveying and surrendering, upon payment by *Lord Dudley and Ward*, his heirs, executors, &c. to *Smith*, his ex-

Lord



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 v.
 Viscount
 DUDLEY and
 WARD.

Lord *Dudley and Ward* by his Will, dated the 6th of *July*, 1788, and duly attested, gave and devised all his messuages, lands, tenements, and hereditaments, and real estate, of which he was then seised, or entitled in Law or Equity, or had power to dispose of, to the Plaintiffs; upon trust by sale or mortgage to pay his debts and legacies, and in the mean time out of the rents and profits to pay the interest of that mortgage debt, and, subject thereto, for the Plaintiff, his natural daughter, and her children in strict settlement.

The testator *John Lord Dudley and Ward* died soon afterwards; leaving no legitimate issue. His brother, the Defendant *William Lord Dudley and Ward*, was his heir at law. An assignment of the mortgage of 1801 was executed to *Joseph Smith*; reciting, that the copyhold premises within the manor of *Kingswinford* were never surrendered; and by deed poll, indorsed upon the mortgage deed, it was declared, that the sum of 8000*l.*, advanced upon that mortgage, was the money of the Plaintiff Mrs. *St. Paul*, daughter of the testator *John Lord Dudley and Ward*; and that *Smith's* name was used only as a trustee. She married in 1803; and had one child.

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The Bill prayed, that the Defendant, *William Lord Dudley and Ward*, may be declared a trustee for the Plaintiffs with respect to the premises within the said *manors, purchased by the late Lord; and that he may be decreed as Lord of the manor, to grant; and may be restrained by injunction from taking execution under a Judgment in Ejectment; suggesting, that the Defendant insists, that by the effect of the surrenders the premises became parcel of the manors, of which they were respectively held; and passed therewith to the Defendant under the Will of his father; and charging, that it appears

pears from the surrenders having been made to *John Lord Dudley and Ward*, his heirs and assigns, that it was his intention to exclude *William Lord Dudley and Ward* and those in remainder and reversion from taking the benefit thereof; and therefore the Defendant is to be considered as a trustee for the Plaintiffs, the devisees in trust under the Will of *John Lord Dudley and Ward*; insisting, that the covenant, entered into by *John Lord Dudley and Ward*, to surrender the premises within the manor of *Kingswinford* to *Jacob Smith*, to secure 8000*l.*, is to be considered as equal to a covenant to exercise his power of re-granting the premises, as copyholds.

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WARD.

Mr. Richards, Mr. Hart, and Mr. Newland, for the Plaintiffs.

Lord Dudley and Ward, tenant for life of the manor of *Sedgley*, with remainders over, having taken a surrender to him and his heirs of copyhold premises within the manor, any slight act is sufficient evidence of his intention to pay the money for his own benefit, and keep the incumbrance alive. It is extraordinary to suppose him not to have intended to keep the purchase distinct from the manor. Upon that supposition the natural course would have been to take the surrender according to the limitations of the manor; instead of taking it to himself and his heirs. The plain conclusion from that circumstance is, that this copyhold estate was not to merge in the manor; * and that in Equity it should be considered his property; as if he had taken the surrender to a trustee in trust for himself.

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The question as to the estate in the manor of *Kingswinford* is different. The mortgagee, having contracted for valuable consideration with a person, who had the power to make a re-grant of these copyhold premises,

was

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 DUDLEY and
 WARD.

was entitled to compel the remainder-man to make it; according to the equity, which prevailed in the case of *Shannon v. Bradstreet* (67).

Suppose, instead of resting upon the covenant, that in execution of it the copyhold in question had been re-granted to the mortgagee: he would have been tenant of the copyhold to him and his heirs, according to the custom; and would have been so at the death of Lord *Dudley and Ward*. The question then is, whether the Equity of Redemption would not have been the property of the tenant for life of the manor: whether he would not have been owner of that Equity for his own benefit; or whether it would have merged in the inheritance. The interests were severed. The interest, whatever it is, under the Equity of Redemption, is not parcel of the manor. Upon the principle, that whatever ought to be done is in Equity to be considered as done, the late Lord *Dudley and Ward* himself would have been owner of this Equity of Redemption; and though he did not himself pay off this mortgage, his devisees did out of the rents and profits of the real estate on account of the other Plaintiff. The Equity of Redemption passed under his Will to the Plaintiffs. It is not parcel of the manor in any way, but a mere Equity. The covenant to make a re-grant is in this Court equivalent to a conveyance. The words of the Will are large enough to carry this; which is an interest, distinct from the manor; and is, either as real or personal property, included in the Will. This case has analogy to that of tenant for life paying off an incumbrance.

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Sir *Samuel Romilly*, and Mr. *Heald*, for the Defendant.

The Equity, now set up, is perfectly new. The late Lord *Dudley and Ward* might have taken a surrender of this

this copyhold originally, or, having it extinguished for a time, he might have made a grant to another person, in trust for himself. Instead of taking either course, he permits it during his whole life to remain extinguished. It was held in *Roe, on the Demise of Hale v. Wegg* (68), that under a demise of a manor copyhold premises, afterwards purchased, and the surrender taken to the devisor and his heirs, passed, as parcel of the manor; and notwithstanding a subsequent demise by the devisor from year to year; and in *Doe, on the Demise of Gibbons v. Pott* (69), that copyhold lands, purchased by the lord, after a mortgage of the manor in fee, and the surrender taken to the mortgagor and his heirs, will be included, as parcel of the manor; and the Equity of Redemption passed under a settlement by the lord of all his estate mortgaged.

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WARD.

Relief cannot be given upon the supposition, that the parties were ignorant of the legal effect of their acts. The case, that comes nearest to this, is that of tenant for life, paying off an incumbrance: but a strong and inevitable analogy is necessary. Suppose, in that case the tenant for life had taken a release of the debt, which he paid off: could he be represented as intending to continue it subsisting? Upon the same principle every improvement by the tenant for life, by planting, or otherwise, should be considered his property, distinct from the freehold. As to the premises in the manor of *Kingswinford*, if the mortgagee had applied, he would have been considered as having a right to a grant: but this is an application, not of the mortgagee, but of persons, who had paid off the mortgage. The case of *Shannon v. Bradstreet*, applies only to the case of the mortgagee; which is not disputed.

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(68) 6 Term Rep. 708.

(69) Doug. Octavo edit. 710.

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DUDLEY and
WARD.*The Lord CHANCELLOR.*

As to the premises in the manor of *Sedgley*, the case is simply this. Tenant for life of the manor takes a surrender of a copyhold to him and his heirs. The legal effect of that is, that the property becomes parcel of the manor. It is said, that an Equity arises out of the transaction, and the fact, that the tenant for life paid the money for the inheritance, that those, who are entitled to the manor in remainder, shall be considered as trustees of that copyhold estate for him. The fact of payment of the money constitutes a case very clear. It is no more than the lord buying the copyhold; and in the act of buying destroying the copyhold. That has been long familiarly known; and I never before heard this Equity stated. The actual intention may probably be defeated. In the case, that has been cited by Sir *Samuel Romilly*, of the devise of a manor, the deviser afterwards purchasing a copyhold within it, he probably did not intend it to pass by the Will: yet the Court of King's Bench held, that it did pass.

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If tenant for
life, paying
off an incum-
brance, in that
transaction

merges the se-
curity by tak-
ing an Assign-
ment, connect-

ing it with the legal estate of inheritance, upon that transaction *prima facie* there is no charge.

In the case of tenant in tail, as he represents the inheritance, the presumption is, that, whether he takes an assignment, or not, the debt is gone; unless there is evidence of an intention to continue it a charge.

It has been said, that this is analogous to the case of tenant for life, paying off an incumbrance. It is so in *this respect. If the tenant for life at the time he pays off the debt in that transaction, merges the security by taking an assignment, connecting it with the legal estate of inheritance, upon that transaction, *prima facie*, there is no charge. With regard to tenant in tail the presumption is, that, whether he takes an assignment, or not, as he represents the inheritance, the debt is gone; and there

there is no charge; unless there is evidence of an intention, that it should continue an incumbrance. As far as analogy goes, if the copyhold premises by the effect of the legal conveyance become parcel of the manor, the case of the tenant for life is rather against, than in favor of the claim (70).

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WARD.

The case as to the other premises is more difficult. They became parcel of the manor. The tenant for life might have regranted them; and it is true, that, if tenant for life of a manor, having a power to grant, covenants to make such a grant, that would in equity bind the remainder-man: being in the nature of an execution of a power. But here, after this copyhold became parcel of the manor, Lord *Dudley and Ward* made a mortgage of freehold estates; and covenanted to surrender this copyhold; which, as far as the deed is evidence, he then thought was copyhold; and it is not a stretch to deal with the estate, as he could; in order to give the mortgagee the substantial benefit of his contract. A Court of Equity therefore would compel the Lord to regrant by copy; which must be to *A.* and his heirs according to the custom; and it could not be consistent with the intention to keep the copyhold alive, that the incumbrancer, when paid, was to surrender to him and his heirs; as the effect of that surrender would be again to make the copyhold parcel of the manor. The question then as to the premises in the manor of *Kingswinford* is simply, whether this Court will call upon the remainder-man to make good *this mortgage, not at the instance of the mortgagee, but in favor of a third person; claiming, not as mortgagee, but what might, or might not, have been the effect of a regrant to the mortgagee; if in execution of the

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(70) See ante, *The Countess of Shrewsbury v. The Earl of Shrewsbury*, Vol. I, 227. *Redington v. Redington*, 1 Ball & Beat. 131.

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 WARD.*

the contract with him that regrant had been made. That regrant might have been made without giving any interest to these Plaintiffs. My opinion therefore is, that the Plaintiff has no equity.

The Bill was dismissed.

ANONYMOUS.

1808.

May 29th.

Though generally a party cannot be heard, until he has cleared his Contempt, a step, taken by the other party, waives the Contempt for all purposes, except the right to costs in the cause; not to be obtained by process of Contempt. [175]

Acceptance of the Answer therefore a waiver of the Contempt for the purpose of enabling the Defendant to dismiss the Bill for want of prosecution.

THE Defendant having been in contempt for want of an answer, at length put in an answer, without making any stipulation for payment of the costs. The Answer was accepted; and replied to; and the Plaintiff not having proceeded afterwards for three terms, a Motion was made to dismiss the Bill for want of prosecution.

Mr. *Maddock*, for the Plaintiff, objected, that the Defendant could not make this Motion, or take any step to the prejudice of the Plaintiff, until the contempt was discharged: referring to the passage (71) in the case of *Fowles v. Young*.

Mr. *Wetherell*, in support of the Motion, insisted, that the Plaintiff, not having proceeded to enforce the process of contempt, but having accepted, and replied to, the Answer, had waived the contempt for this purpose; though

(71) Ante, Vol. IX, 173.

though his title to the costs was not gone: the Defendant was therefore entitled to the usual undertaking to speed the cause.

1808.

ANONYMOUS.

The Lord Chancellor.

The general rule, that has been referred to, is perfectly true; that a party, who has not cleared his contempt, cannot be heard: but the question here is, whether, the Answer having been accepted, and replied to, without insisting upon the costs, and enforcing the process of contempt, the contempt is not gone for every purpose, except the right to costs. The Register informs me, that the Plaintiff by accepting the Answer does not lose his costs, as costs in the cause; but only waives the remedy by process of contempt; and cannot enforce payment of the costs by that process, which by taking that step he has given up. I think that is the rule; the Plaintiff having by this act considered the Defendant, as if he had cleared his contempt.

The Order was made accordingly (72).

(72) See *Boehm v. Detaset*, 1 Ves. & Bea. 324, and the references. *Smith v. Blofield*, 2 Ves. & Bea. 100. *Const v. Ebers*, 1 Madd. 530. *Green v. Thomson*, *Haskins v. Lloyd*, 1 Sim. & Stu. 121, 393.

1808.

*June 5th.*BOUGHTON *v.* JEWELL.

Purchaser of small lots entitled to attested copies of the title-deeds, accompanying the principal purchase, at the expense of the vendor: no stipulation having been made upon the subject.

MR. *Bell*, for a purchaser of small lots, part of an estate, sold before the Master, moved, that he may have attested copies of the deeds, which were to accompany the principal purchase, at the expence of the vendor; the particular not containing any stipulation upon the subject.

Mr. *Johnson*, for the vendor, opposed the Motion; insisting, that the purchaser must take the attested copies at his own expence.

The Lord CHANCELLOR said, if the purchaser had no intimation, that he could not have the deeds, he is entitled to attested copies at the expence of the vendor; as, if he had notice, that he was not to have them, he would regulate his bidding accordingly; conceiving, that he was to bear the expence of procuring copies.

The Order was made accordingly (73).

(73) *Dare v. Tucker*, ante, Vol. VI, 460.

1808.

*June 30th.*PALMER *v.* LORD AYLESBURY.

Order, that depositions shall be read at the trial of

SIR *Samuel Romilly*, and Mr. *Hart*, for the Plaintiff, upon a Motion to vary the minutes of an Order, directing

an Issue, if the witnesses shall be then dead; or proved to be in such a state of health as not to be capable of attending.

Without such Order, to make the depositions evidence at law, the whole Record must be read.

recting an issue, desired a direction, that the depositions of the Plaintiff's witnesses may be read at the trial, in case the witnesses shall be then dead.

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Lord
AYLESBURY.

Mr. *Richards* and Mr. *Owen*, for the Defendant, opposed the Motion; as being unnecessary.

The Lord CHANCELLOR.

The direction prayed is not unnecessary; and is according to the practice; founded upon this distinction. If depositions are offered at the trial without an Order, for the purpose of making them evidence, the whole record, bill, answer, &c. must be read: but, if there is an Order for reading depositions, the Court of Law will read them upon that Order; without going through all that course for the purpose of making them evidence. This direction is therefore necessary; to save that expense.

The direction, inserted in the Order, was, that the depositions of the Plaintiff's witnesses be read at the trial of the issue; in case such witnesses or either of them shall be dead at the time of the trial; or shall be proved at such trial to be in such a state of health, as to be capable of attending (74).

(14) Post, 299. *Andrews v. Palmer, Corbett v. Corbett, n. & Bea.* 21, 334.

WALKER v. WINGFIELD.

1808.

June 8th.

Order on Motion of Defendant for examination of Plaintiff, saving just Exceptions: the Plaintiff consenting to be examined.

The MASTER of the ROLLS, for The Lord CHANCELLOR.

AN Order had been made by the *Master of the Rolls* on the Motion of Defendants for the examination of a Plaintiff, saving just Exceptions: the Plaintiff consenting to be examined: but the Register (75) having some doubt as to the regularity of the Order, it was mentioned again.

Mr. Bell, in support of the Motion.

The objection of the Register is, generally, to permitting any Defendant to examine a Plaintiff under any circumstances: but the result of all the authorities is, that the Court will look into the circumstances; and that this Order, saving just Exceptions, and upon producing the consent of the Plaintiff to be examined, is regular. Most of the authorities appear to want the latter circumstance: *The Mayor and Aldermen of Colchester v. ———* (76). *Phillips v. The Duke of Buckingham* (77). *Troughton v. Gitley* (78). *Hewatson v. Tookey* (79). *Armiter v. Swanton* (80). If the Court will look into the circumstances, this case is very particular: a Bill by some persons, claiming as next of kin against others: one of the Defendants is a branch of the same family with the Plaintiffs; and this Plaintiff is to be examined, not to establish his own case, but to shew, that there are some persons in the same situation, the same degree of relation, as himself; who will be entitled, if he is. The Order

[*179]

(75) Mr. Walker.

(76) 1 P. Will. 595.

(77) 1 Vern. 227; see 230.

(78) 1 Dick. 382.

(79) 2 Dick. 799.

(80) Amb. 393.

Order being made, saving just Exceptions, the objection to receiving this evidence will be open hereafter.

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WALKER

v.

WINGFIELD.

The MASTER of the ROLLS.

This is not the case of one Plaintiff examining a co-Plaintiff, nor a Defendant examining an involuntary Plaintiff; but a case, in which the Plaintiff consents to be examined by the Defendant. In that respect some of the cases, that have been referred to, are not applicable. The question may be made at the hearing, whether the relation and situation of the parties are such, that it is fit, that the depositions should be read: but I think, the Order may be made saving just Exceptions (81).

(81) See post, Vol. XVIII, *Atkinson*, 2 Cox, 413. *Whate-*
517. *Murray v. Shadwell*, *ley v. Smith*, 2 Dick. 650.
2 Ves. & Bea. 401. *Lee v.*

LLOYD v. PASSINGHAM.

1808.

June 8th.

The MASTER of the ROLLS, for The Lord CHANCELLOR.

Defendant, in
Newgate under
a Criminal Sen-
tence, having
been brought
up by *Habeas*
Corpus for not
putting in his
Answer, and
remanded to
Newgate, as to
the farther
proceeding,
quære.

A DEFENDANT, confined in *Newgate* under sentence upon a criminal prosecution, having been brought up by Writ of *Habeas Corpus*, to be admonished for not putting in his answer, was returned to *Newgate* (82). Upon an application for an *Alias Habeas Corpus* the Register took the objection, that it could not be granted; unless the prisoner was really or nominally in the custody of the Warden of the *Fleet* Prison.

Mr.

(82) See *Rogers v. Kirkpatrick*, ante, Vol. III, 573, and the note.

1808.
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 LLOYD  
 v.  
 PASSINGHAM. Mr. *William Agar*, for the Plaintiff, desired, that he should be turned over to the *Fleet pro forma*; and then sent back to *Newgate*; which course he said had been adopted in *Bowes's Case*, after considerable difficulty upon it.

Mr. *Benyon*, for the Defendant, produced the Six Clerk's Certificate, that the answer was filed.

*The MASTER of the ROLLS.*

The difficulty, stated by the Register, is from his being remanded to *Newgate*; the Writ of *Alias Habeas Corpus* being directed to the Warden of the *Fleet*; in whose custody the prisoner is not. In *Bowes's Case* he continued in contempt: but this Defendant, having put in the answer, has discharged his contempt; and therefore must be remanded of course.

HUGUENIN v. BASELEY.

1808.  
*July 20th.*  
 Injunction, on AN Order had been obtained by the Plaintiffs, upon a Motion of course, that a Writ of Injunction should issue; enjoining the Defendant to deliver up possession of the decreed; as a ground for the Writ of Assistance, the only mode of obtaining immediate possession: a Court of Equity properly acting only *in personam*.  
 Order of the House of Lords, that proceedings under a Decree of a Court of Equity shall not be staid by an Appeal, unless by special Order upon application to the House, or the Court.  
 Writ of Error generally stays Execution in Civil cases: not in Criminal.

the estate, according to the Decree, which was pronounced in this cause (83). Mr. *Trower*, who obtained the Order, said, the object was to ground upon it the Writ of Assistance; to be executed by the Sheriff in case of disobedience; this course, though it had not been adopted for about twenty years, being the only mode of obtaining immediate possession of land, when decreed: a Court of Equity properly acting only *in Personam* (84).

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HUGUENIN  
v.  
BASELEY.

A Motion was afterwards made by the Defendant, that proceedings under the Decree should be staid, until an Appeal should be presented to the House of Lords.

Mr. *Richards*, Mr. *Leach*, and Mr. *Wetherell*, in support of the Motion, said, the object was only to suspend the delivery of possession; urging the consequences to the Defendant, in the nature of irreparable mischief, by the great improvements he had made with a view to residence; and offering to pay the arrears of the annuity. The Appeal had not been lodged during the Session from want of time to lodge it within the period, fixed by the Standing Order of the House.

Sir *Samuel Romilly*, Mr. *Hollist*, and Mr. *Trower*, for the Plaintiffs, opposed the Motion; insisting, that the doubt, which formerly prevailed upon this point, is now settled by a general Order of the House of Lords, made in the last Session upon the Report of a Committee; and the application in this instance was not made under circumstances more favourable than that in the case of *The Warden and Minor Canons of St. Paul's v. Morris* (85).

*The*

(83) See the Report, ante, Vol. XIV, 273, 607.

(85) Ante, Vol. IX, 316, See the note.

(84) 1 *Ves.* 454.

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 HUGUENIN  
 v.  
 BASELEY.

*The Lord CHANCELLOR.*

In the case of a civil action, almost generally, a Writ of Error stays the proceedings; and upon the ground, that has been mentioned by Sir *Samuel Romilly*, that the Record is in theory supposed to be in the Superior Court; brought there by the Chief Justice for the purpose of being referred to. In criminal proceedings it has upon grounds of great policy been thought better, that particular mischief should be endured, than that there should be delay in inflicting the punishment: a mischief, which was considered greater than the other. In the case of Appeals from the Court of Session of *Scotland*, which is a Court both of Law and of Equity, there is, since the Union, something very singular. Upon that occasion an express claim was made, that application should be made to Parliament for *Remed* of Law; as they call it; yet that should not *sist* execution: but in fact execution has been always *sisted* until the late regulation.

What was the Law with reference to this point upon Appeals from the Court of Chancery, it is very difficult to state positively. Now however it is settled by the highest authority, that of the House of Lords itself, that an Appeal from a Court of Equity to that House does not stay execution of the Decree: but it is consistent with that regulation, that a special application may be made either to the House of Lords, or to the Court below; with this observation; that it is much more expedient, that the application should, if it can, be made to the House, than to the Court below; as the Order, made upon that occasion, may be the subject of Appeal; and it is difficult to determine how far Appeals may go (86).

With

(86) *Macnaghten v. Boehm*, 1 Jac. & Walk. 48.

With reference to this case, without any feeling of prejudice in favour of this Decree, or of regret from reflection upon it, the pledge, given by Counsel, obliges me to regard it in this stage as reasonably doubtful. There would have been no difficulty in introducing this Appeal to the House of Lords : but suppose, it could not have been introduced without special reasons, alleged by some Peer: it is to be regretted, that the application was not made here, while the House was sitting; as this Court might have directed an application to be made to the House to stay execution; who might have dispensed with their Standing Order; and this Appeal would have been decided out of course. Misapprehension has led to the difficulty: but it cannot be carried farther than a presumption, that the judgment is right; until it is shewn to be wrong; and the Judge is not to act upon it, as if he thought it wrong; admitting, that the pledge of Counsel throws a serious doubt upon it. This is the case of a person, entitled at all events to an annuity of 400*l.*; with arrears accrued. The trustees would have been in possession for her benefit. The proposal is, that the possession shall be held against the Decree upon the terms of paying the arrears. The Appeal may be presented, when the House sits again; and in this case no irreparable mischief can follow; but the Court by giving much encouragement to such applications will palsy the arm of Justice.

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 HUGUENIN  
 v.  
 BASELEY.

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The proceedings were accordingly staid upon the terms proposed; and in the following Session the Decree was affirmed upon Appeal; the Defendant not appearing.

GENERAL



1808.

HUGUENIN  
v.  
BASKLEY.

GENERAL ORDER of the HOUSE of LORDS,

REFERRED TO IN THIS CASE.

*Die Mercurii, 12th August, 1807.*

The Lord *Walsingham* reported from the Lords Committees, appointed to consider of the petition of *Thomas Burke*, Esq. and others, Appellants in a cause, depending in this House; to which *Dominic Browne*, Esq. is Respondent; praying their Lordships, that all farther proceedings under the Decree may be staid; that the Committee had met and considered the said petition; and heard Counsel on both sides; and had directed him to report, that it appears to the Committee, that according to very ancient practice in this House, Appeals to this House were considered by the House as staying proceedings in the Courts of Equity; the Orders, Judgments, or Decrees, of which had been called in question by such Appeals; and that such practice in very remote times might obtain without much inconvenience in the administration of Justice. The Committee however find, that for a very long course of years past the Courts of Equity have never forborne to proceed notwithstanding Appeals against their Orders, Decrees, or Judgments; and with knowledge, that such Appeals had been lodged in this House; except in cases, in which their judicial discretion has induced them upon the application of parties interested to stay or modify such proceedings on account of such Appeals; and that such habitual practice of the Courts of Equity hath frequently and repeatedly fallen within the knowledge and under the observation of this House; whilst the Appeals were depending therein. The Committee therefore conceive, that according to the present

sent practice of this House, Appeals do not stay proceedings in such Courts in the causes, in which Appeals are made; and that such causes may be proceeded on in the Courts of Equity; unless such Courts should make Order thereon to the contrary in causes, in which they may be applied to for that purpose; or unless in special cases this House should interpose by special Order; and the Committee, attending to the nature of proceedings in Courts of Equity, and the numerous Appeals, which in each cause may be lodged in this House against the Orders and Decrees of the Court, and the effect, which the suspension by Appeals of their proceedings must have, are of opinion, that the practice, as now understood, cannot be departed from without introducing consequences the most oppressive to the suitors in Courts of Equity, and the utmost inconvenience in the administration of justice in such Courts.

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v.  
BASELEY.

Which Report, being read by the Clerk, was agreed to by the House; and resolved accordingly (87).

(87) Post, *Waldo v. Caley*, 208, 216; see the note, ante, *Willan v. Willan*, Vol. XVI, IX, 316.

BAILLIE v. SIBBALD.

1808.  
March 22d,  
23d.  
July 6th.

THE Bill stated, that in 1789 Mr. D, arrived from *England at Calcutta*, with a letter of recommendation to the Plaintiff from the Defendant, undertaking Plea of the Statute of Limitations to a Bill of Discovery over-ruled upon letters, assigning reasons for declining to pay; and recommending the Plaintiff to bring an Action; as amounting to an acknowledgment of the debt, sufficient to take it out of the Statute upon the authorities, though against principle.

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 v.  
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to guarantee the payment of any money, which the Plaintiff should advance to *D.* to the extent of 10,000 Sicca Rupees. Upon the 1st of *August* in the same year, the Plaintiff received another letter from the Defendant; stating, that, *D.* having received a sum of money on account of the Defendant, he revoked his letter of credit to the Plaintiff in *D.*'s favor. By another letter to the Plaintiff dated the 20th of *November*, 1790, the Defendant stated, that it was by a misunderstanding of his own that he had revoked the letter of credit; explaining the cause of that misunderstanding; and concluding in these words:

"I therefore repeat, that my revoking this credit has vexed me exceedingly. On receipt of this I request you will offer Mr. *D.* 10 or 15,000 Rupees on his bond; which I will pay you either in this country or in *India*; whichever you may prefer."

The Bill farther stated, that the Plaintiff accordingly upon the credit of the last letter, advanced to *D.* 15,000 Rupees; and *D.* having also a letter of credit from a brother-in-law of the Defendant upon the *Advocate-General* of *Calcutta*, the Plaintiff's son-in-law, who had lately died, the Plaintiff upon the request of *D.* advanced him the farther sum of 10,000 Rupees. The advances were made to *D.* in *January* and *May*, 1792, and *January*, 1793, upon his bonds, payable two years after date. In 1793 the Plaintiff, being in *England*, spoke to the Defendant upon the subject of his advances to *D.*; when the Defendant objected to being guarantee for repayment of the whole sum of 25,000 Rupees; expressly admitting his responsibility as guarantee for the repayment of 15,000 Rupees and interest. In 1798 *D.* failed to pay the interest; and soon afterwards absconded. In 1801 the Plaintiff called upon the Defendant for payment

payment according to his guarantee; and the Defendant, in answer, wrote the following letters; the first dated the 7th of *September*, 1801:

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 SIBBALD.

"I received your favor of the 14th of *August*, too ill in bed to reply to it immediately. I have not words to express my surprise and concern at his contents. I entirely thought, I had years ago (for reasons I will explain to you whenever I have the pleasure of seeing you) revoked my letter of credit to young *D.*; and what gives support to this belief is, that *D.* wrote to his friends here, that Mr. *Sibbald*, having revoked his letter of credit, had fortunately done him no harm; since his valuable friends Mr. *B.* and Mr. *E.* would not suffer it to make any difference in their support and advances of money to him. A copy of these letters I can procure, and send you; when I am well: but in the interim request to be favoured with a copy of the engagement you mention; and of his receipts; as it is my wish to do every thing, that is fair and honorable; however severe and unexpected the blow may be. I thought, the money I advanced to this young man on his first arrival in *Bengal* was going a great way to oblige his friends; who were certainly mine also: but *D.* was to me himself almost a stranger. This sum, to the extent of near 400*l.*, I considered as a gift. I think, his friends will be astonished, when they see your claim after the letters before mentioned; which they have received from him."

"I am favoured with your last letter, without a date; and would wish you to commence a suit; as I find, the point in dispute cannot be settled without it. The gentlemen in question say, they are not, or, what is the same thing, that I am not, bound either in justice, honor, law, or equity, to make good your loss; that you should have transmitted Mr. *D.*'s bonds, when you advanced him the money,

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 SIBBALD.

money, and demanded payment: but, in place of this, you receive, I think they say, 12 *per cent.* as long as Mr. *D.* was able to pay it: from which perhaps you have paid yourself; and, as soon as he becomes insolvent, you then claim upon a letter of credit, granted a dozen of years before. If *D.* had continued to pay your high *India* interest for ten years longer, they conclude, that they should have heard nothing of your claim. If the bonds had been transmitted, before Mr. *D.* became insolvent, they would have had an opportunity of recovering the money; and on my part I have to add your refusal of the security, offered you by Commissioner and Mr. *H.*; when you was before in *England*; which, if accepted, would have saved me from all trouble in this very disagreeable business. But they had, from your expressions of friendship for *D.* at that time, and the services, rendered by him, &c. that you wish to serve him at your own risk. They have besides all this a variety of important documents, aided by decided law opinions. So, as I said before, a suit only can decide it."

The Bill, stating farther, that the Plaintiff had brought an action against the Defendant, prayed, that the Defendant may answer; a Commission to examine witnesses abroad; and that he may be at liberty to read the depositions upon the trial.

The Defendant, to so much of the Bill as sought a discovery, pleaded in bar, that, if the Plaintiff had any cause of action, &c. the same arose above six years before filing the Bill, and above six years before serving the Defendant with process to appear and answer; and that the Defendant did not at any time within six years before the filing of the Bill, or before service, &c. promise or agree to come to any account, or pay, &c. concerning

cerning the matters charged by the Bill; and therefore the Defendant pleads the Statute of Limitations (88).

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Sir *Samuel Romilly*, in support of the Plea.

Two questions arise upon this plea: First, whether it will lie to a Bill of Discovery: Secondly, whether this case is taken out of the Statute. The first point requires authority against the plea; and, though no decision in favor of it can be found, there must have been frequent instances of bills in such a case, if this defence could not be made. In many cases where the Statute of Limitations has been pleaded to an action, the Defendant, if put to answer upon his oath, could not say, that he had paid the debt: such bills therefore must have been very numerous; unless it had been understood, that they would not lie. This bill, beyond the usual prayer of a discovery, proceeds to ask a Commission.

Secondly: The Courts have gone a great way in taking cases out of this Statute: to an extent, which Lord *Ellenborough*, in the case of *Bryan v. Horseman* (89), laments: but no authority goes farther than a direct admission, as there was in that case, or a necessary implication of an admission, that the debt is due; and the inference of an assumpsit to pay from that direct, or implied, acknowledgment of a debt, is, though settled, certainly a strong conclusion. The words in *Trueman v. Fenton* (90) amount to an acknowledgment of the debt. In *Yea v. Fouraker* (91) the question was, not as to the amount, but whether any debt was due. One of the strongest cases, *Lawrence v. Worrall* (92), might have afforded

(88) Stat. 21 *Jam.* I. c. 16.  
s. 3.

(91) 2 *Bur.* 1099. *Bul.*  
*Ni. Pri.* 149.

(89) 4 *East*, 509.

(92) *Peake's Ni. Pri. Cas.*

(90) *Cowp.* 548.

p. 93.

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afforded a presumption for a Jury: it is only a decision at *Nisi Prius*; and Lord *Kenyon* afterwards held cases not to be taken out of the Statute by much stronger words. *Clarke v. Bradshaw* (93) is merely an extra judicial opinion, not even a decision at *Nisi Prius*: a direct undertaking by another partner being proved. *Rucker v. Hannay* (94) was a clear acknowledgment of the debt. In *Lloyd v. Maund* (95) Lord *Kenyon* held the letter not sufficient to take the case out of the Statute: but a new trial was granted: the Court conceiving, not that the letter was sufficient, but that it ought to have been left to the Jury. The two letters in this case do not amount to an acknowledgment, that any debt is existing; and a decision that they constitute an undertaking to pay, would go farther than any authority. The second letter merely expresses a wish, that an action should be brought; as there was no prospect of an amicable arrangement: and the other merely professes the Defendant's wish to do every thing, that is fair and honorable. There is nothing dishonorable in insisting upon a defence, which the law has given: particularly considering the situation of this Defendant; acting as a trustee for others. This debt might have been paid by the other parties; who were liable in the first instance.

Mr. *Leach* and Mr. *Newland*, for the Plaintiff.

A plea of the Statute of Limitations cannot be maintained against a Bill of Discovery, as, if the Plaintiff takes issue upon it, he must undertake to prove all, which he must prove at law, to maintain his action. Lord *Redesdale* (96) states four pleas, that are bars to Bills of Discovery: all collateral to the subject, to be tried at law.

The

(93) 3 *Exp. Ni. Pri. Cas.*
 155, 7.

(95) 2 *Term Rep.* 760.

(96) *Mitf.* 223.

(94) 4 *East*, 604, n.

The plea to this Bill puts in issue the whole, that is to form the subject of the trial at law. *Hindman v. Taylor* (97), and *The Dean and Chapter of Westminster v. Cross* (98) are authorities, that this Statute cannot be pleaded to a Bill of Discovery.

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The next objection to this plea is, that, if the Bill charges any fact, that may avoid the Bar, that ought to be denied, not only generally, by averment in the Plea, but specifically by Answer (99). Here is a fact charged, that will avoid the Bar, created by the Statute: the letter of *September*; which, not denying the debt, states grounds of defence; and is a clear admission of the debt; which at law would be sufficient to take it out of the Statute. That fact therefore ought to have been denied both generally by the plea, and specifically by answer. That the slightest acknowledgment of a debt is sufficient to take it out of the Statute, is proved by the several cases, that have been mentioned. What other construction can be put upon the Defendant's recommendation to the Plaintiff to bring an action than this: "Prove the debt; and I will pay you."

Sir *Samuel Romilly*, in Reply.

This falls within the general objection, that the case, stated by the Plaintiff, is not such as entitles him to a discovery: the Defendant being enabled to say upon his oath, that he has not within six years made any promise, &c. A Plaintiff may be able to prove a promise, an undertaking, within six years; but not to specify the precise amount of the debt; and may want a discovery of that. The instances of a replication to a plea are very rare: it generally is not worth while to take that course.

The

(97) 2 *Dick.* 651.

See *Bayley v. Adams*, ante,

(98) *Bunb.* 60.

Vol. VI, 586; and the note,

(99) *Mitf.* 205, 212, 213. 596.

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*The Lord CHANCELLOR.*

These letters appears to me to go much farther than many of the cases, which at law have been considered as out of the Statute; which has been construed with the view to defeat, not to promote, its object. The Court of King's Bench have held, that a man, by desiring another to bring an action against him, takes the case out of the Statute; and I believe, it will be found, that where a man has asked for the documents and vouchers of the demand, when furnished with them, he has not been permitted to say, he did not mean to pay. There is a case (100) of an action against Lord *Inchiquin* upon a bill of exchange, near nineteen years old: his answer referred to his agent; and he asked in the letter, how the Plaintiff had settled it with Lord *Cork*. That passage, and the reference to the agent, were held to take it out of the Statute.

*Sir Samuel Romilly, in Reply.*

There was a deed of trust in that case; and Lord *Cork* was one of the trustees; which perhaps might have been the ground: a trust for creditors in equity taking all debts out of the Statute.

*The Lord CHANCELLOR.*

In all these cases the construction is against the principle of the Statute. The only course upon such an application is to be silent (1).

*July 6th.*

*The Lord CHANCELLOR* over-ruled the Plea; considering the letters sufficient to take the debt out of the Statute.

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(100) *Baillie v. Lord Inchiquin*, 1 *Esp. Ni. Pri. Ca.* *Dewdney*.  
 435.

(1) Post, 482, *Ex parte*

LECHMERE v. CHARLTON.

ROLLS.

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July 28th.

**BY** indentures of lease and release, dated the 14th and 15th of *August*, 1732, being the settlement, made on the marriage of *Edmund Lechmere* with *Elizabeth Charlton*, one of the daughters of *Sir Blundell Charlton*, in consideration of 3000*l.*, her marriage portion, *Edmund Lechmere* conveyed his capital messuage, called *Severn End*, and certain manors and hereditaments in the county of *Worcester*, to *Lord Foley* and *Thomas Foley*: as to the manor of *Redmarley*, and part of said premises, after the marriage, to the use of *Francis Charlton* and *Paul Foley*, their executors, administrators, and assigns, for five hundred years; with remainder to *Edmund Lechmere*, for life: remainder to *Lord Foley* and *Thomas Foley*, upon trust to preserve contingent remainders: remainder to the first and other sons of the marriage, in tail male: remainder to *Edmund Lechmere*, in fee.

Portions, to be raised by a Trust Term in a marriage settlement: the real estate held the primary fund; and a covenant by the settler to pay them auxiliary only.

The term of five hundred years was declared to be in trust to raise 6000*l.* for the daughters and younger sons of the marriage: to be paid and divided among them, as *Edmund Lechmere* and *Elizabeth Charlton* should jointly appoint; and, in default of appointment, equally: the shares of sons to be paid at the age of twenty-one; and the shares of daughters at twenty-one or marriage: but it was declared, that if any younger son should attain twenty-one, or any daughter should attain twenty-one, or marry, in the life-time of *Edmund Lechmere*, his or her portion should be raised and paid within six months after *Edmund Lechmere's* death; with interest;

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terest; with a provision for survivorship. A covenant then followed, by *Edmund Lechmere*, for himself, his heirs, executors, and administrators, with *Francis Charlton* and *Paul Foley*, to pay the sum of 6000*l.* to and amongst the younger children of the said *Elizabeth Charlton*, by him the said *Edmund Lechmere* begotten, in such manner and proportions and at such times as hereinbefore appointed for payment thereof to them.

There was issue of the marriage two children: *Nicholas Lechmere*; who took the name of *Charlton*; and *Edward Lechmere*. In 1763 *Edmund Lechmere*, and *Nicholas Lechmere Charlton*, suffered recoveries of the settled estates; and limited them to *Edmund Lechmere* for life; with remainder to *Nicholas Lechmere Charlton*, for life: remainder to trustees to preserve contingent remainders: remainder to the first and other sons of *Nicholas Lechmere Charlton*, in tail; with remainders over.

By indentures, dated the 17th of *June*, 1784, in consideration of 2500*l.*, lent by *William* and *John Matthews* to *Nicholas Lechmere Charlton* and *Edward Lechmere*, *Nicholas Lechmere Charlton* demised certain premises, of which he was tenant in tail, for five hundred years, and *Edward Lechmere* assigned the portion of 6000*l.*, to which he was entitled under the settlement, to *William* and *John Matthews*; subject to redemption on payment of 2500*l.* and interest.

By indentures, dated the 20th of *November*, 1786, reciting the deed of *June*, 1784, and that *Francis Charlton* had been the surviving trustee of the term of five hundred years; and was then dead; having by his Will appointed *Nicholas Lechmere Charlton* and *Edward Lechmere* his executors; and farther reciting, that *Edward Lechmere*

Lechmere had applied to *Joseph Berwick* to lend him 4000*l.*; and that *William* and *John Matthews*, being satisfied, that the premises, demised to them for five hundred years, were a sufficient security for the 2500*l.* and interest, had agreed to release the portion of 6000*l.*; in consideration of 4000*l.* paid by *Berwick* to *Edward Lechmere*, and for other considerations mentioned, *William* and *John Matthews* and *Edward Lechmere* assigned and confirmed to *Berwick* the portion of 6000*l.*; and *Nicholas Lechmere Charlton* and *Edward Lechmere* assigned the term of five hundred years, created by the settlement, to *Berwick*; subject to redemption on payment of 4000*l.* and interest.

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On the 7th *March*, 1798, *Berwick* died; having by his Will given the principal money and interest, due on the mortgage, and the residue of his personal estate, to the Plaintiff *Mrs. Lechmere*, his only child; married in 1787 to the other Plaintiff *Anthony Lechmere*. *Edward Lechmere* died in 1798, intestate; and letters of administration of his personal estate were granted to *Anthony Watts*.

Edward Lechmere by his Will, dated the 20th *December*, 1798, devised his real estates to the Plaintiff *Anthony Lechmere*, his youngest son by a second marriage, and his heirs; and gave all his personal estate to *Nicholas Lechmere Charlton* and the Plaintiff *Anthony Lechmere*, equally; and appointed them his executors. *Edmund Lechmere* died on the 29th of *March*, 1805; the Plaintiff *Anthony Lechmere* proved his Will; and possessed his personal estate; which was insufficient for the payment of his debts.

Nicholas Lechmere Charlton, being the surviving Executor of *Francis Charlton*, the term of five hundred
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years; created by the settlement, became vested in him, and he had issue *Edmund Charlton*, his eldest son, tenant in tail of the premises, comprised in the term. The principal and interest, due under the mortgage to *Berwick* at the death of *Edmund Lechmere* the elder, amounted to more than 6000*l*.

The Bill was filed for an account of the principal and interest, due upon the mortgage of 4000*l*.; praying, that *Watts*, the administrator of *Edward Lechmere*, may pay the same; or be foreclosed; that *Nicholas Lechmere Charlton* may be decreed by sale or mortgage of the premises, comprised in the term of five hundred years, to raise the 6000*l*. and interest; and pay the same to the Plaintiffs in satisfaction of the money due to them, so far as the same would extend.

The question was, whether the portion of 6000*l*. was primarily charged on the settled estates, or whether the covenant of *Edmund Lechmere* the elder, did not make that sum a personal debt, payable in the first place out of his personal estate; the real estates being only an auxiliary fund.

Sir *A. Piggott*, Mr. *Richards*, and Mr. *William Agar*, for the Plaintiffs, argued, that the real estates were the primary fund; and the covenant only a collateral security—that there is no instance upon a family settlement, charging portions, that they have been treated in this Court as a debt previously due from the settler; which those, who take the settled estate, are entitled to call upon the personal estate to discharge; that the cases, in which the personal estate is applicable in exoneration of the real estate, are all cases, where a personal debt is contracted, by which the personal estate has been augmented; and the real estate was only pledged. They  
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cited *Lanoy v. The Duke of Athol* (2), and *Lewis v. Nangle* (3).

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Mr. *Alexander*, Sir *Samuel Romilly*, and Mr. *Gyfford Wilson*, for the Defendants, entitled to the Estate.

This is a case of intention. The parties might have meant to throw the portion upon the personal estate in the first instance; which was benefited by the wife's portion of 3000*l.* If they had such a meaning, this is the proper mode of carrying it into effect. It is a very unusual covenant; and therefore the inference is, that something unusual was intended. *Lanoy* and *The Duke of Athol* cannot be relied on: the Report is too imperfect; and the other case does not apply. The distinction cannot be upon the borrowing and lending; but the presumption upon the original transaction is, that the personal estate was to be the primary fund.

Sir *Arthur Piggott*, in Reply, said, that the reason of this singular covenant was, that the estate was in jointure, to the mother of *Edmund Lechmere*; and, consequently, if she had survived him, the children might have been for a long period without a provision.

*The MASTER of the ROLLS.*

It is difficult to conceive, how a man can make himself a debtor, (although by the same instrument, he charges the real estate), without subjecting his personal assets in the first instance to the payment of the debt. Here the settler certainly makes himself a debtor by his covenant. Where a person becomes entitled to an estate subject to a charge, and then covenants to pay it, the charge

(2) 2 *Ath.* 444.

*Wilson v. The Earl of Dar-*

(3) 2 *P. Will.* 664. Mr. *linton*, in Mr. *Cox's* note; *Cox's* note to *Evelyn v. Evelyn*, and the note, ante, Vol. I, *lyn. Amb.* 150. See also 187.

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charge still remains primarily on the real estate, and the covenant is only a collateral security, because the debt is not the original debt of the covenantor. The intended wife or her friends may have thought the eldest son not sufficiently provided for; and this covenant may have been intended as a benefit to him. I incline upon general principles to consider this as a personal debt, but I must look into the case of *Lanoy v. The Duke of Athol*, before I decide the point.

The MASTER of the ROLLS afterwards decided, that the covenant was auxiliary only; and pronounced the Decree accordingly.

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DUFF v. THE EAST INDIA COMPANY..

Dec. 7th, 15th.

Bill by Assignees of a Bankrupt, claiming a debt, which had been paid

to his partner, as paid after notice of dissolution of the partnership, that partner retiring, and the Bankrupt continuing, dismissed: the terms of the alledged arrangement not being made out: so as to establish the right in equity of the Bankrupt against the legal right of the other partner.

The other questions therefore were not determined:

1st, Whether a demand, the result of an over-payment in advance upon a single transaction of sale between merchants, or merchant and factor, was within the exception as to merchants' accounts in the Statute of Limitations.

2dly, As to the effect of that exception; whether including merchants' accounts generally, or those only with items continuing within the six years.

3dly, Upon the objection of laches, independent of the Statute.

THE Bill stated, that in the year 1789, *George Urquhart Lawrie* and *William Farquharson*, partners in the agency business at *Calcutta*, contracted to supply the

the Defendants with 2000 maunds of indigo for the investment of that year, upon the following terms: that the Defendants should advance to *Lawtie* and *Farquharson*, at certain times several sums, amounting to three fourths of the value of such indigo, to be estimated by their appraiser; that the indigo should be sent to *England* in the Defendants' ships, and at their risk, as far as the amount of their advance; and be sold at their sales on account of *Lawtie* and *Farquharson*; and that the Defendants should deduct from the proceeds the amount of their advance, at an exchange of 2s. 3½d. per current rupee, in full for interest, freight, and assurance; and should pay the surplus to *Lawtie* and *Farquharson*; who should be liable to the Defendants for any deficiency.

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In pursuance of this contract the Defendants in *March* and *April*, 1789, advanced to *Lawtie* and *Farquharson* 112,000l. current rupees: but, before any delivery of indigo, in *February*, 1789, *Farquharson* was appointed Military Paymaster General of the Defendants' forces; and by a subsequent Order, dated the 4th of *March*, it was ordered, that servants of the Company, holding the offices specified, among which was that of Paymaster, should be precluded from any concern in commercial transactions. The partnership of *Lawtie* and *Farquharson* was accordingly dissolved on the 30th of *April*, 1789; and the dissolution was published in the *Calcutta Gazette*; and the business was afterwards carried on by *Lawtie* alone; who, at the end of the year 1789, or the beginning of 1790, delivered nearly half the quantity of indigo; alleging as an excuse for the short quantity the general failure of the crop. The quantity of indigo delivered was valued at current rupees 115,291 and 15 annas; of which sum three fourths amounted to current rupees 86,468 and 15 annas and 3 pice; and the sum, advanced by the Defendants to *Lawtie* and *Farquharson*,
exceeded

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exceeded the stipulated three fourths by current rupees 26,031 and 9 pice; for which balance the Defendants applied in the beginning of the year 1790 to *Lawtie* and *Farquharson* and their sureties; but acceded to their request to wait, until it should be seen by the sale of the indigo, whether the proceeds would prove sufficient for the liquidation of the whole advance in *England* at the stipulated exchange.

The sale produced a sum equal to the liquidation of the full advance, with a surplus of current rupees 88,643, 4 annas, 4 pice, equal to 8800*l.* sterling; which sum was received by the Defendants. *Lawtie* came to *England* in 1790: and in 1791 a Commission of Bankruptcy issued against him. The Bill was filed in 1803 by the assignees under that Commission; praying an account of the money, received by the sale of the indigo, and of the advances by the Defendants to the partnership, and payment of the balance, with interest, charging, in answer to pretences suggested of payment to *Farquharson*, notice of the dissolution of the partnership from the advertisement in the Gazette, the general notoriety of *Farquharson's* acceptance of an office, incompatible with it, and acknowledgments of it in letters by *Lawtie* and *Farquharson*, in answer to the demands of the Company for payment of the excess of their advance.

The Defendants by their answer stated, that they believed, the partnership was dissolved from the 30th of *April*, 1789, in pursuance of the Order of the 4th of *March*; and the dissolution was published in the *Calcutta Gazette*; of which they had notice; and that *Lawtie*, as between him and *Farquharson*, took upon himself the performance of the indigo contract, and of all other the engagements of the partnership; as appears by his letter to the Board of Trade, dated the 4th of *May*, 1790.  
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They stated, that the Order was a regulation by the Defendants for the government of their servants; and not restrictive upon them; but they were at liberty, notwithstanding such Order, to continue or make any engagements or contracts with any of their servants, comprised therein, as if in no such Order had been made; and after that Order and the dissolution of the partnership the Defendants advanced money to, and dealt with, *Farquharson* and *Lawtie* on the indigo contract; and *Farquharson* was not relieved from his obligation to the Defendants, as such contractor: nor the Defendants from their obligation to him; and, notwithstanding the dissolution, the Defendants addressed their letters on the subject to both *Lawtie* and *Farquharson*; and always considered the contract with them both as a subsisting contract.

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The answer farther stated, that the whole sum of 88,643 current rupees, 4 annas, 4 pice, was paid to *Farquharson*, in consequence of his application by letter, dated the 31st of *August*, 1792; stating, that he was much pressed; that the advance on account of the indigo contract would greatly relieve him; that his difficulties arose from his connection with *Lawtie*; and offering an indemnity, in these terms: "To save the Company against any eventual loss Messrs. ——— will agree to make themselves responsible, and fully indemnify the Company from any consequence, that a compliance with any request can produce;" which was accepted; and the payment made in *September* and *October*, as *Farquharson* had by the contract a legal right to receive the money; and in consequence of its being manifested, that *Lawtie* was considerably indebted to *Farquharson*. The Defendants stated their belief, that *Farquharson* is living in the *East Indies*; and is a person of property, fully sufficient to answer any claim the Plaintiffs may have against him in respect of that payment; and submitted, that under the circumstances

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"ourselves responsible to make good any deficiency after "the account of the sales in *England*:" and stating, that the indigo delivered by *Lawtie* on account of the contract of *Lawtie* and *Farquharson*, though not equal to the amount of what ought to be delivered, exceeds the whole of the advances according to the valuation of the Company's inspector.

After the argument it was admitted, that no advances had been made by the Company subsequent to the dissolution of the partnership between *Lawtie* and *Farquharson*; and that the passage in the answer to that effect was erroneous.

*Mr. Richards, Mr. Hart, Mr. Leach, and Mr. Cooke,*  
 for the Plaintiffs.

First, as to the objection from the length of time, the Statute of Limitations was made to protect persons, who by the length of time, that had been permitted to elapse, were induced to neglect their vouchers: but it is admitted, that, the money, claimed from the Defendants, is due; unless the payment to *Farquharson* was a proper payment. If he was before the Court, he could not plead the Statute. The Defendants, taking an indemnity from him, by that step put themselves in his place; and must account in the same manner; as he must have accounted. The defence, set up against this demand, is an attempt to cover that payment; which, being made merely from personal favor to *Farquharson*, and with direct notice, cannot be justified. These persons might stipulate, as between themselves, that *Lawtie* alone should have the contract. In the case *Ex parte Ruffin* (5) against an agreement upon the retirement of one partner, that all the

(5) Ante, Vol. VI, 119.

the effects of the partnership should be considered as the property of the continuing partner, the joint creditors attempted to raise an equity, for an application of effects, remaining in *specie*, to the satisfaction of their debts: but the *Lord Chancellor* upon great consideration determined against that claim. Therefore a debtor, having notice, that the right to that debt is in one partner only, cannot discharge himself by payment to the other. The supposed loss of vouchers, which is the origin of the Statute, is not very applicable to this great body; as it is to individuals. A Court of Equity, following the rule, that the slightest admission of the debt takes it out of the Statute (6), will not allow this defence to be made, where the fact of the existence or payment of the debt is not doubtful: the Defendants admitting, that as between them and this bankrupt the debt is still subsisting; if the payment to *Farquharson* cannot be maintained. Payment by the obligor to the obligee, after assignment of the bond, with notice, would not be good in equity: so, if *Lawtie* alone, and not *Farquharson*, had given notice, the subsequent payment by the Company to *Farquharson* would have been in their own wrong: but the notice is by a joint letter of *Farquharson*, *Lawtie*, and their two sureties.

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Another consideration with reference to this ground of defence is, that this is a case between merchant and merchant; or between a merchant and his factor or agent; and the Statute of Limitations expressly excludes merchants' accounts. It was certainly said by Lord *Hardwicke* in *Welford v. Liddel* (7), that such accounts, if concluded six years, and no item within that period, are within the operation of the Statute; the Exception in the

(6) See *Baillie v. Sibbald*, ante, 185.

(7) 2 Ves. 400. *Jones v. Pengree*, ante, Vol. VI, 580. The question was decided ac-

cording to this opinion of Lord *Hardwicke*, post, *Barber v. Barber*, XVIII, 286. See XIX, 185, and the note, ante, VI, 582.

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the Statute applying only to the case, where there is an item within six years; the effect of which is, that the whole would be protected. That opinion, however, was expressed without due consideration; and stands in direct opposition to a later opinion of Lord *Kenyon* in *Catling v. Skoulding* (8), that merchants' accounts, generally, are not within the Statute; and how can it be otherwise: the Statute expressly, and without any qualification, excluding them?

In *Martin v. Delboe* (9) the judgment admits, that to an action of account the Statute could not have been pleaded. The Statute specifies the particular actions, against which it provides a defence; and the effect of the Exception is, that the action upon merchants' accounts is not included. In *Wace v. Wyburn* (10) Mr. Justice *Denison* defines, what are to be considered as merchants' accounts; as arising from mutual dealings between two persons, respectively merchants: not as between a tradesman and his customer. In *Webber v. Tyvill* (11) it was taken clearly, that merchants' accounts are not within the Statute; though no item fell within six years.

Taking this not to be strictly the case of merchant and merchant, the Company must clearly be considered as the factor of these persons in this transaction. At least the Defendants were trustees, employed to sell; and the Statute does not attach upon trusts. It is not sufficient to say, there is a balance; which might be recovered by action: there is a right to an account; to ascertain, whether that balance is correct; and, even supposing it admitted,

(8) 6 *Term Rep.* 189; see *Cotes v. Harris*, 1 *Esp. Dig.* the note in the preceding 151.  
 page.

(9) 1 *Mod.* 70.

(11) 2 *Saund.* 121. See

Serjeant *Williams's* Note, 127,

(10) *Bul. N. P.* 140. See 4th edit.

admitted, the jurisdiction of this Court cannot be withdrawn, merely on the ground, that an action might be maintained: an action for money had and received; which is considered as an equitable action. The Statute does not apply to equitable demands; though its general principle has been adopted, as the foundation of a wholesome rule, to a certain extent; not universally. This is in the nature of a trust: a deposit, or pledge, to be accounted for; and time does not raise a bar; preventing the obligation of a trustee to account with his *Cestui que trust*. In the instance of a mortgage the principle of the Statute of Limitations is adopted, by taking twenty years: the period which determines a right of entry at law: but if, instead of an absolute mortgage, the transaction is a conveyance, upon trust after a certain period to sell the estate, and to account, after payment of the money lent, with interest, for the money, produced by the sale, the creditor would not be enabled by any lapse of time to hold the estate, which he had got at law; and to insist, that he was not bound to sell, and liable to account in equity. That obligation is equally referrible to a chattel interest.

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Sir *Arthur Piggott*, Sir *Samuel Romilly*, and
 Mr. *Wyatt*, for the Defendants.

This was a subsisting demand, previous to the year 1791; and no reason is assigned for the delay. The payment to *Farquharson* was good at law; and there is no equity for the Plaintiffs, representing *Lawrie*. The dissolution of the partnership would not affect the obligations upon, or to, the partners: neither would the bankruptcy of one partner: the solvent partner would remain answerable for every obligation of the partnership, and entitled to receive all, that was due to it, up to the period of dissolution. Nothing short of an assignment of the debt

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debt could prevent the right of either party to receive, notwithstanding the dissolution. Upon that ground this Court appoints a Receiver upon a disagreement between partners; as either is entitled to receive the debt, and give a discharge. The effect of the bankruptcy of one is only a right to a division of goods existing *in Specie*; and, as to other property, to an account up to the dissolution; including an indemnity against all the debts of the partnership; and the balance only to be accounted for by the solvent partner. In this case therefore notice of the dissolution of the partnership, and that *Lawtie* alone was to be interested in this contract for the future, and of the bankruptcy of *Lawtie*, did not affect the right of *Farquharson* to receive this payment. None of those circumstances can be represented as amounting to an equitable assignment of the debt. In the instance of a bond, assigned with notice, the effect depends upon the preceding act of assignment: an unequivocal act; conferring upon another person the original right of the obligee to receive the money. The construction, that there was an equitable assignment of what might be due, cannot be put upon any thing, that passed between these parties. If *Farquharson* had brought an action, what defence could have been made? The payment, being clearly good at law, must be shewn not to have been valid in Equity; and it must be made out, that the Defendants knew that. This is, not a single transaction between *Lawtie* and *Farquharson*, but one article in a general partnership between them. The Plaintiffs ought to shew, that a settlement of all partnership transactions between them had taken place; and that upon the whole result *Farquharson* had no right whatsoever to receive this money; to reimburse himself against demands, made, or which might be made, by creditors of the house. The notice to the Defendants was not, that they were not to pay *Farquharson*, as he had ceased to have any beneficial

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interest; but a mere statement by letter, that *Lawtie* alone had become entitled to the profit, and liable to the loss in that transaction; not intimating, that *Farquharson* was not entitled to receive the money; to reimburse himself against other demands. The effect, if not the object, of the Bill, filed in this country. *Farquharson* being out of the jurisdiction, is, that the justice, which might have been obtained in *India*, by an account of all partnership transactions, is defeated. There is no evidence of notice to the Company not to pay to *Farquharson*, and to pay *Lawtie*; as he by an arrangement between them had become entitled to the whole of that debt, previously due to both. The equity therefore wholly fails.

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With respect to the Statute of Limitations, the last transaction between these parties is the sale of this indigo by the Company. At that time, in 1790 or 1791, the price, and the credit to be allowed, were fixed. This is the whole account: the balance of debt and credit upon a single article: the result of one advance of money, and the produce of one sale: no account being settled, or stated, ascertaining a balance, an action of account upon an *Insimul Computassent* could not have been maintained: the action must have been either for goods sold and delivered, or for money had and received. This is not the case of an open account current, with items continuing: the case, to which the exception of the Statute applies: an account, commencing perhaps fifty years ago; but continuing within the period of six years. When the sale took place, there was a cessation of all transactions between them: no unascertained balance remaining: but a balance to be struck merely by the subtraction of one sum from the other. The decision in the case of *Catling v. Skoulding* (12), and all the other authorities,

(12) 6 Term Rep. 189; see the note, ante, 205.



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authorities, are consistent with the Statute, understood as protecting accounts between merchants, only where the accounts are open and continuing: the opinion, expressed by Lord *Kensyon* in general terms, has not been adopted; and there is no instance of an account between merchants, closed for six years, that has been treated as within the exception. Such an instance in this commercial country ought to be produced. The construction, considering it sufficient, that the subject is merchants' accounts, that it is of no importance, whether the account is continuing, or that the parties might forty years ago have ceased to be merchants, would render the Statute perfectly useless, in cases where such a limitation is particularly required: where persons had been concerned in merchants' accounts; their dealings however not having led to a continuation of the account within the period of six years. What reason can be assigned for excluding from the benefit of this law merchants; who in the multiplicity and complication of their transactions are peculiarly liable to the loss of vouchers? To this demand, in the shape of an action at law, the Statute might have been pleaded; and this Court will adopt it; acting upon the same principle. The admission, that the debt has not been paid to the Plaintiffs, cannot have effect, where upon the transaction, as stated by the Defendants, satisfaction may very well be presumed. Is there not a fair presumption, that these Plaintiffs settled accounts with *Farquharson*; and that this sum, paid by the Defendants, was allowed in account? In what other way can the delay be accounted for? The presumption is stronger against assignees under a Commission of Bankruptcy, bound to make a dividend within a limited period. The principle of the Statute is, that from the lapse of six years without demand payment shall be presumed; not positively enacting, by way of penalty, that the debt shall be forfeited. Even considering the Statute as not applicable, upon all the principles

principles of this Court with reference to laches this Bill must be dismissed: principles, adopted by analogy to the Statute; upon which the equitable remedy is lost by laches; as the right to redeem a mortgage after twenty years. In this instance twice the period, fixed by the Statute, has been allowed to elapse without any reason. It is strictly within the Statute: merely an action for money had and received: goods sold, or upon an account stated: the Company being employed as factors to sell the goods: a single transaction: not to be represented as the case of merchants' accounts.

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The argument, considering this as a trust, goes to an extent, that has never been allowed; from a single transaction, giving a right to an account for the produce of a parcel of goods, according to a price stipulated, constituting a trust; with the view of enabling the party, not to obtain a remedy for any alleged breach of trust, but to bring forward a claim at the end of thirteen years; having during all that period abstained from any demand. The precaution of taking an indemnity cannot place those, who made the payment in a different situation. If there could be any possibility of question, they had a right to demand an indemnity.

Mr. Richards, in Reply.

The notice, given to the Defendants, was, in substance, not only that *Farquharson* did not supply the indigo; but that he had relinquished all concerns with *Lawtie*; and the Defendants were informed by the joint letter of the two principals and their sureties, that *Lawtie* was the only person, concerned in the contract. That agreement between them, that *Lawtie* alone should be concerned, though not a regular assignment, has in equity the effect of an assignment. Length of time, it is true, might,

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independent of the Statute, be used as evidence, that the money had been paid: but there is no instance of pleading the Statute; admitting at the same time, that the debt is due; that it never was paid; but, as no demand was made for six years, insisting upon the Statute. The answer, making that admission, would destroy the plea; which rests upon the presumption of payment: the acknowledgment of the debt taking it out of the Statute; and raising by implication a new promise (13). As the plea at law is "*Non Assumpsit infra Sex Annos*," so, in this Court the proposition is, that the Defendant does not know, that the debt is due. With that admission therefore the Defendants cannot avail themselves of the Statute. As to the argument from the length of time, upon the presumption, that some account was settled between *Lawtie* and *Farquharson*, such a presumption, against the admission, that the money was not paid to *Lawtie*, and without any case made for it, or even a suggestion, cannot arise. The circumstance, that this was a single transaction, if it passed between persons, acting as merchants, or as merchant and factor, cannot make any difference. The reason, that there is no late instance upon this Exception in the Statute, is, that the action of account is obsolete: but the authorities, that have been cited, agree with the position of Lord *Kenyon*, that merchants' accounts, generally, are not within the Statute; but are by the effect of the Exception left, as all accounts were before. Length of time is certainly a considerable objection in equity; but only upon the ground, that the Defendant has lost the opportunity of defending himself, or of recovering money, which he had paid over to another. No suggestion of that sort appears in this Answer: the indemnity, which is stated by the Answer to be by bond, may be enforced; and *Farquharson* is admitted

(13) See *Baillie v. Sibbald*, ante, 185.

admitted to be perfectly sufficient to answer the demand.
No injury therefore has arisen from the delay.

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The question in this cause is, whether the money becoming due on account of the contract, was well paid to one of the partners, with whom the contract was made? The legal right was unquestionably in the partnership. The Company, having paid to one, could not be sued by the other; and, even if they had not paid, they could not have been sued by one separately: but, if *Lawtie* had the exclusive right in Equity to the whole, and they had sufficient notice of that exclusive right, then the payment was wrong; and the equitable owner cannot be affected by such payment.

Payment to
one partner a
good dis-
charge.

One partner
cannot sue se-
parately.

It is obvious, that this question comes on in a shape, very disadvantageous to the claim of the partnership. It is to be determined in the absence of the partner, interested in support of that claim; where the Defendants are not necessarily conversant of his case, and have no ultimate interest in the decision; as, if the Company are decreed to pay the Plaintiffs, *Farquharson*, without any opportunity of being heard upon the right, must refund to them in compliance with his undertaking; whereas if the Plaintiffs have the right, they might make it effectual against *Farquharson*; and if he were before the Court as a joint Defendant, (as, if within the jurisdiction, he ought to be,) the order for re-payment, if made at all, would be made upon him in the first instance; and the Company would be liable only subsidiarily. Under these circumstances, if the Court ought to entertain the suit at all they are at least bound to see, that the Plaintiff makes out very clearly and satisfactorily *Lawtie's* right to the sum in controversy.

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It appears to me, that the Court is not put in possession of the materials, necessary to enable it to determine with certainty, how the right stands as between the partners. *Lawtie's* claim professedly arises from an agreement upon a dissolution of partnership. Without knowing the whole contents of that agreement, how is it possible to decide upon the merits of the claims, made under it? The agreement is not before the Court: we know nothing of it, but by the representation of its contents in letters, written for a purpose, totally distinct from that of adjusting any rights, accruing under it; and a purpose, that did not require the mention of any conditions, by which the general effect of the agreement might be qualified. Those letters were written to the servants of the Company in order to excuse failures, or to obtain indulgence, as to the contracts. The relative situation of the partners, subsequent to the dissolution, is introduced only for that purpose. No communication was ever made to the Company with the direct object of informing them, or their servants, how the rights precisely stood between these parties, with regard to the proper payment of any money, that might be coming from the Company to the Contractor; for the letters are all answers to letters from the Board of Trade. The dissolution in 1789 produced no notification, farther than an advertisement of that dissolution in the public papers. There was no direct notification made to the Company. About a year afterwards, when the Board of Trade was pressing the Contractors, *Lawtie* for the first time stated, that he had taken upon himself the entire burthen of the contract.

The inference, that I draw from this, is, that letters under such circumstances, and for such purposes, cannot be relied on, as necessarily containing the whole contents of the agreement, to which they incidentally refer. There is but one letter by *Farquharson*; and upon the point of right

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right that is the only letter, which is at all evidence. *Lawtie's* letters are evidence upon the point of notice to the Company; but not upon the point of right between him and *Farquharson*; except so far as *Farquharson* was privy, and concurred; which appears only in one letter. Can it be conceived, that the two lines, in which he refers to the agreement, contain the whole agreement upon their dissolution of partnership? All, that he says, is, that he could not have expected, he was to derive profit, or incur loss, from the contract: why? On account of some agreement he had entered into, relative to that contract, and the whole engagements of the partnership. Are we entitled to infer, that the agreement might not have contained some clauses, which in the events, that have happened, would entirely deprive *Lawtie* of any right? for instance, that, if he should not fully execute the contract, he should not have the exclusive right to the profits? When *Farquharson* says, it could not be expected, that he was to derive profit, or incur loss, is it to be implied, that, when unexpectedly he finds himself in that situation, he meant to admit the effect of his agreement to be, that, though in the case of loss he must bear it, yet *Lawtie* should be entitled to the profit; if any profit should be made? Taking the whole, that appears, relative to the agreement, even including *Lawtie's* letters, it is impossible to say, what was the precise arrangement of these parties with reference to their interests in the partnership.

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The interest of a retiring partner may be transferred to the other upon very various terms, and through the medium of very different stipulations. It may be, as in the case alluded to, of *Ex parte Ruffin* (14), a sale out and out. Here is no appearance of that. It might be a transfer

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(14) Ante, Vol. VI, 119; *Fell*, X, 347. *Ex parte Williams*, XI, 3.
see the note, 129.

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transfer to *Lawtie* of the partnership credits, subject to the payment of all the partnership debts? That is another mode, in which their engagements might have been concluded. I rather suppose from the representation in the Bill, that it is meant to be stated, that *Lawtie* was to take upon himself the payment of all the debts, and to have all the credits, and to indemnify *Farquharson*. Taking that to be the case, upon what ground could *Lawtie*, or those standing in his place, come into a Court of Equity, to seek the benefit of that arrangement, without being able to shew; that he had done much more than any where appears, and more than from what does appear he can be presumed to have done? If *Lawtie* derived any legal benefits under that assignment and arrangement, he may be entitled to keep them; whether he has performed the contract on his side, or not: but can he call upon a Court of Equity to put him in possession of all the advantage of the agreement without upon his part performing that, which was to be the consideration? Has he performed his part? Has he paid all the partnership debts, and kept *Farquharson* indemnified? It is clear, he has not. At the distance of about a year from the dissolution *Lawtie* was in a state of evident insolvency. He professes himself to be utterly unable to replace to the Company the excess of advances, or to complete the contract. It is clear, that, if instead of profit, this transaction had terminated in loss, that loss must have fallen upon *Farquharson*: yet it is to be contended, that the profit, if any, must belong to *Lawtie*. It is equally clear, that, if the Company chose to sue for damages for non-completion of the contract, they must have been paid by *Farquharson*. *Lawtie* being utterly unable to pay, or to indemnify \*him. If any debts had been incurred in *India* in performing what was performed, those debts must have fallen upon *Farquharson*: yet *Lawtie* was to take the whole produce without indemnifying him against the debts, even those,

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those, relating to the transaction itself. That is not the state, in which a Court of Equity would lend its aid, to place these parties. I have said, all legal advantages *Lawtie* may be entitled to keep; and a Court of Equity would not interfere to deprive him of them: but upon what principle is equity to interfere to put him in possession of advantages, for which he has not given any consideration?

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This case differs entirely from the case *Ex parte Ruffin*: First, it does not appear, that this agreement was of the same nature as the agreement in that case; and upon the particular nature of that agreement much stress was laid. Next, the partner, to whom the assignment was made, or his assigns, were not seeking the interference of the Court; but stood upon the defensive; and all, that the Court did, was to refuse to interfere against them, in favour of the partnership creditors, upon petition, giving them leave to file a Bill. In this case, not having the whole agreement before me, I ought not to decree in favour of one, claiming entirely upon the footing of that agreement; and, if the agreement contains nothing more than I can collect from these proceedings, the Plaintiffs, standing in the place of *Lawtie*, are not entitled to a performance of those parts of it, which are in his favor.

This Bill must therefore be dismissed; though under the circumstances I do not think, that it is necessary to

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July 25th, 26th.

A partnership being dissolved by the Bankruptcy of one partner, the assignees are entitled, beyond an account and distribution of the stock, &c. to a participation of subsequent profits, made by the other partners, carrying on the trade with the capital, as constituted at the time of the Bankruptcy.

As far as the profits may have been produced by a joint application of that and other funds, *quære*.

IN September, 1801, *Collins, Noble, and Boughton*, entered into partnership in the business of pump and engine manufacturers. In December, 1803, a Commission of Bankruptcy issued against *Noble*. In August, 1804, this suit was instituted upon a Bill, filed by the assignees under that Commission against *Collins and Boughton*; stating, that a patent was granted in 1799 to *Noble* for a certain apparatus to be applied to the working of pumps, engines, &c.; that another patent was granted in 1800 to the Defendant *Collins*, for improvements in the application of metals or metallic mixtures, as a substitute for iron, in several parts of chain pumps; that the expences of soliciting the said patents were defrayed out of the said partnership funds of *Collins and Co.*; that no articles were entered into as to the term or continuance of the partnership; stating the shares and terms, upon which they had verbally agreed; that the partnership entered into a contract with the Navy Board to supply the navy with pumps, &c.; determinable on six months' notice; which contract had not been determined; and that, besides the profit, made under that contract, they carried on a very extensive business as pump and engine makers; but no account had been settled.

The Bill prayed, that the Plaintiffs, as assignees of *Noble*, may be declared entitled to three eighth parts of the profits, which have arisen, and which shall arise, from carrying on the said co-partnership business, and which remained unaccounted for to *Noble* at the time of his bankruptcy; or have accrued since; and also to three eighth

eight parts of the said patents, and to all profits and emoluments to arise therefrom; and that the said three eighth parts thereof may be sold for the benefit of the bankrupt's estate; an account of all dealings and transactions, &c.

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The Decree, made on the 5th of *August*, 1805, directed an account of all dealings and transactions in partnership between *Noble* and the Defendants down to the 7th of *October*, 1803, the time of *Noble's* bankruptcy: without prejudice to the question; whether the Plaintiff, as assignees of *Noble*, are entitled to a share of the profits of the partnership business, subsequent to the 7th of *October*, 1803. The Master's Report stated, that the Defendants and the bankrupt carried on the business of pump and engine makers, in partnership from *September*, 1801, previous to which time the said business had been carried on by *Noble* and *Collins* in partnership with other persons; that the business was carried on in leasehold premises; and it was argued at the commencement of the partnership, that the capital of their trade, consisting of the said leasehold premises, the tools and utensils of the trade, and the money, then advanced by the partners severally, should be estimated at 5333*l.* 6*s.* 8*d.*; of which three eighth parts, being 2000*l.* were to be considered as the share of *Collins*: three other eighth parts as the share of *Noble*: and the remaining two eighth parts as the share of *Boughton*. The capital was afterwards reduced by agreement; and the clear profits of the trade to the 7th of *October*, 1803, were estimated at 3053*l.* 2*s.* 0*½d.*; of which *Noble's* share amounted to 1144*l.* 18*s.* 3*½d.* The stock in trade and capital of the partnership on the 7th of *October*, 1803, consisted of the leasehold premises, where the trade was carried on, with the tools and implements and goods, manufactured and unmanufactured: the whole va-

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lued at 3053*l.* 8*s.* 0*½d.*; whereof three eighth parts, for the share of *Noble*, amounted to 1145*l.* 0*s.* 6*d.*

The cause came on for farther directions.

Sir *Samuel Romilly*, Mr. *Hart*, and Mr. *Cooke*, for the Plaintiffs.

The Plaintiffs are entitled to an account of the profits of their capital, used and hazarded in the trade, carried on by the Defendants. The case of *Hill v. Burnham* (15) is a direct authority upon the point: the Plaintiff married one of the daughters of the testator; by whose death the partnership between him and the Defendant was dissolved: the Defendant, who was the executor, having continued to carry on the trade with the same capital, your Lordship declared, that, the testator's trade having been carried on after his death with his capital, the Plaintiffs were with his other children entitled to the profits in proportion to the shares they were respectively entitled to in his personal estate. Bankruptcy certainly puts an end to a partnership: but the consequences would be most mischievous, if the solvent partners are at liberty to carry on the trade for their own benefit with the property, and at the risk, of the bankrupt. The principal has been acted upon in innumerable cases. In the instance of an executor or trustee, employing the trust money in his trade, the *Cestui que Trust* has an option to have interest, or the profit made.

Mr. *Alexander*, Mr. *Leach*, and Mr. *Roupell*, for the Defendants.

The proposition, maintained by this Bill, is equally contrary to principle; the interests and practice of traders, and

(15) In *Chancery*, 25th November, 1805. *Register's Book*, A, 1805, folio 425.

and the understanding and feelings of mankind: amounting to this; that, if one partner becomes bankrupt, and the assignees under his Commission are so negligent as not to call for an account, and a sale, of his interest, they may afterwards compel the other partners to account for all the subsequent profits of the trade, carried on with labour, capital, and risk. Upon what ground can these assignees be considered partners in this trade: a manufactory of pumps for ships? The patent, taken out in *Noble's* name, though with the partnership funds, was never used to any extent; and *Noble*, who had stipulated to employ his skill, withdrew from the business. The argument with reference to that therefore fails. The assignees were bound to call for an account immediately. That proportion of the capital could not be considered as capital, to be employed in the trade of the remaining partners. It was not their capital, employed, in any sense. This cannot be compared to the case of executors, or trustees. The remaining partners were, not trustees for these assignees, but debtors to them, liable to account in equity. The ground of a claim of partnership must be either the application of skill; or Capital in its proper sense; not a mere debt, or liability. These assignees cannot be represented as making themselves personally liable for the adventure; as they might do certainly: but that purpose must be signified.

As to the right to a sale, they could not insist upon a sale of the entirety of the leasehold premises, but only of the undivided interest. Under an execution against one the sheriff seizes the whole; but sells only the undivided interest. As tenants in common, they would be entitled to an account of the produce of the sale of manufactured goods, but not of goods manufactured, at the time of the bankruptcy; which put an end to the concern; depending upon personal character, skill, &c. In the

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the case of *Hill v. Burnham* (16) the executor carried on the trade with the stock of the partnership, as executor; meaning to do so; and pledging it in his partnership trade. That he could not do. The executor and trustee are answerable for carrying on the trade, as a breach of duty: but these partners have violated no duty. In every instance of a separate bankruptcy the right of the assignees is only an account; and to have a value set upon the specific chattels at the time of the bankruptcy. The claim, beyond that, to a share of the subsequent profits, is made by persons, who could pay no personal attention to the trade; and could not be liable to any loss. It never was held, that upon the bankruptcy of one partner there must necessarily be a sale of the whole. The consequences would be extremely hard upon the solvent partner; who would thus be removed from his means of livelihood; by no fault of his; and for the sake of the person, whose misconduct has produced the embarrassment. The legal effect of the bankruptcy of one partner is a dissolution: the partnership ceases: there is an end of all the joint concern; and, as a consequence, the assignees are entitled to all the bankrupt's interest in the property at the time of the bankruptcy. This is an attempt to continue the partnership, notwithstanding that legal termination, for the benefit of the assignees, without any new contract, entitling them to share in the subsequent profits; and though they incur no hazard. There would be no mutuality: the remaining partners being liable to future losses in their capital, their own property, and their persons. This is, not a trade, consisting merely of capital, but, a manufactory, under a patent: the premises and the stock in themselves unproductive; and rendered productive only by the application of the skill, personal labour and management, of the remaining partners.

[*223] *The inequality therefore is enormous: the assignees having incurred no risk beyond the mere original value of the timber;

(16) In *Chancery*, 25th November, 1805.

timber; the value of which, when worked up, may be increased tenfold. The bankruptcy of one partner scarcely ever puts an end to a trade, if profitable. The consequences therefore of establishing such a principle will be very extensive.

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Sir *Samuel Romilly*, in Reply.

The principle, upon which this relief is sought, has been acted upon in many cases: not cases of executors, as *Hill v. Burnham* was: the question of law being considered as clearly decided. In the late case of *Brown v. Vidler* (17) a partnership for a term of years in the manufacture of the mail coaches, to continue by the contract for the benefit of executors, the Plaintiff, claiming under a deceased partner, having been prevailed upon by the Defendant to give up her share for an inadequate consideration, filed the Bill to set aside that transaction. Before the cause was heard, the term expired; and, the transaction being set aside by a Decree at the *Rolls*, your Lordship was afterwards of opinion, that the Plaintiff was entitled to a share of all the profits, made after the expiration of the term; including the benefit of the contract with government, made by the Defendant alone.

In another late case, *Coxwell v. Bromet* (18), upon a Bill for an account and injunction, upon disputes between three persons, engaged, as chymists, in partnership for an indefinite term, the Defendant insisted upon an agreement for a dissolution of the partnership as to *Buckley*, one of the partners: he died; and the Bill of Revivor was filed by his representative: your Lordship held, that there was no dissolution: it was then contended, that at least there should be no account beyond the death of *Buckley*:
that

(17) *Register's Book*, A. 1797, folio 837. A. 1803, folio 1049. A. 1804, folio 129.
(18) *Register's Book*, A. 1801, folio 181.

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that operating as a dissolution: your Lordship did not determine that point; but intimated a strong opinion, that the account, subsequent to the death, was due.

This is not modern doctrine. In the case of *Brown v. Litton* (19) Lord *Harcourt* expressly declares his opinion (20), that if one of two joint traders dies, and the survivor carries on the trade after the death of the partner, the survivor shall answer for the gain made by this trade: to the same effect as your Lordship's decision in *Hill v. Burnham* (21); without the circumstance, which can make no difference, that the surviving partner was the executor. In that case the executor is under peculiar hardship. He cannot settle with himself; and therefore cannot, as another partner may, having settled it, buy the property himself. There is another modern case, *Hammond v. Douglas* (22), an express determination of this point, not in the case of an executor, but against a surviving partner, claiming profits, made after the death of the other. The other point determined in that case, that the good-will survived, is certainly very doubtful (23). It is difficult to see, how the good-will, consisting in the habit of the trade being carried on in the same place, can be distinguished; and separated from the lease of the house.

In these cases the Court has never proceeded upon the ground, that this is misconduct; but considers the profits as an accession to the capital; arising out of it; belonging to the proprietor as much as an increase of slaves in the *West Indies*, or of any stock in this country. If one part-owner of a ship without consent, or with the express dissent, of the other, charter her, though there is a proceeding in the Admiralty Court, by which he may in

(19) 1 *P. Will.* 140. See  
 10 *Mod.* 20.

(20) 1 *P. Will.* 141.

(21) In *Chancery*, 25th of  
*November*, 1805.

(22) *Ante*, Vol. V, 539.

(23) See post, 227.

in that case have liberty to do it alone, yet, if he has not taken that course, the other is entitled to a share of the profits; *Strelly v. Winson* (24); and the cases, referred to by Mr. *Raithby*. In *Skip v. Harwood* (25) Lord *Hardwicke* held, upon the claim of lien by *Skip*, that no distinction was to be taken between the stock, actually existing at the dissolution of the partnership, and that, which was afterwards acquired by the continuation of the business: the lien attaching equally upon stock, which came in the course of trade in the place of that which existed at the time of the bankruptcy. There is no ground for the objection, that the account should have been called for sooner. The bankruptcy occurred in 1803; and the Bill was filed in 1804. The assignees, after filing the Bill, would have been liable personally for losses; and they could take no other step; in order to entitle themselves to a share of the profits. The habit of the Court has been to make an allowance to the solvent partners for their skill and exertions; and upon that point the Defendants may have a reference.

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*The Lord CHANCELLOR.*

I cannot adopt the principle, upon which this case has been put for the Defendants; depending upon what is conceived to be the understanding, feelings, and interests, of traders and of mankind upon this subject. I must act upon the Law, as it is understood in this Court; however inconsistent it may be with those interests and feelings. If my opinion was, that in no possible circumstances any account of the profits is to be given, that would dispose of the case against the Plaintiffs: but, if there is a possible case, in which they may have a claim to profits, though there may be many other cases, in which they cannot

(24) 1 Vern. 297.

(25) *West v. Skip*, 1 Ves.  
239, 456; see 244.



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cannot claim, yet upon this record I have no intimation whatsoever, how the profits, if any, have been made; by what application of the funds, stated in the Report, either alone, or combined with other funds, any and what profits have been made, no information is given. The profit may have been made by one simple sale and conversion of the capital, existing at the time of the bankruptcy. Nothing is stated of debts, due to the trade, or advances by these parties; whether from their private funds, or from the conversion of the stock.

Implied obligations among partners, as far as they are not regulated by express contract; for instance, to use the joint property for the benefit of all the owners.

Partnerships are regulated either by the express contract, or by the contract, implied by Law from the relation of the parties. The duties and obligations, arising from that relation, are regulated, as far as they are touched, by the express contract: if it does not reach all those duties and obligations, they are implied, and enforced by the Law. In the instance of a partnership, without articles, the respective proportions of capital contributed by the partners, and the trade being carried on either for a certain period, or the connection dissolvable at pleasure, the time being expired, or, in the other case, notice to determine being given, it cannot be contended, that, if the remaining partners choose to carry on the trade, they can consider the whole property as their own; to be taken at such valuation, as they think proper to put upon it. That is not the Law. The obligation implied among partners, is, that they are to use the joint property for the benefit of all, whose property it is.

Partnership may, after the determination of it by the contract of the partners, con-

Many complicated cases may arise. There may be a partnership, where, whether the parties have agreed for the determination of it at a particular period, or not, engagements must, from the nature of it, be contracted, which cannot be fulfilled during the existence of the partnership, continue for the purpose of winding up engagements with third persons.

partnership; and the consequence is, that for the purpose of making good those engagements with third persons it must continue; and then, instead of being, as it was a general partnership, it is a general partnership; determined, except as it still subsists for the purpose only of winding up the concerns. Another mode of determination is, not by effluxion of time, but by the death of one partner (26); in which case the Law says, that the property survives to the others. It survives as to the legal title in many cases; but not as to the beneficial interest (27). The question then is, whether the surviving partners, instead of settling the account, and agreeing with the executor as to the terms, upon which his beneficial interest in the stock is still to be continued, subject still to the possible loss, can take the whole property; do what they please; and compel the executor to take the calculated value. That cannot be without a contract for it with the testator. The executor has a right to have the value ascertained in the way, in which it can be best ascertained, by sale.

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Partnership determined by death: the legal property survives: not the beneficial interest. Right of the executor to the value of the testator's interest, to be ascertained, not by calculation, but by sale.

If the implied obligation is, that partners are to use the property for the benefit of those, whose property it is, where is the hardship? I concur therefore with the judgment of Lord Rosslyn upon that point in the case of *Hammond v. Douglas* (28); though I agree with the doubt, expressed by Sir Samuel Romilly upon the other point, there determined, that the good-will survives (29). If the surviving partners think proper to make that, which is in Equity the joint property of the deceased and them, the foundation and plant of increased profit, if they do not think proper to settle with the executor, and put an end

Whether upon the death of a partner the good-will survives, *quære.*

(26) Ante, Vol. VI, 126, and the note. (28) Ante, Vol. V, 539. (29) See the note, ante, Vol. V, 540. (27) Ante, Vol. I, 434, 5. IX, 598, 7, and the notes.

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end to the concern, they must be understood to proceed upon the principle, which regulated the property before the death of their partner; and I cannot see, if there had been no specialty in the case of *Brown v. Vidler*, why that decision, if it proceeded upon those principles, would not have been just. The deed, by which the Plaintiff had assigned her share to the Defendant, being set aside, from that moment she became a partner. If that partnership determined by effluxion of time, and without a new agreement the trade was carried on with the property, that was embarked in it, they are supposed to go on upon the old footing; and, whether the patent, or the contracts with Government, had, or had not expired, if from that property, in the view of this Court the property of both, a profit was derived after the expiration of those periods, the Equity may be fairly said to reach that case.

Assignees under a separate Commission of Bankruptcy against a partner, though generally they cannot engage in new adventures, may with consent of the creditors and bankrupt.

As to the case, now before the Court, of the bankruptcy of one partner (30), supposing it the simple case of profit made by the mere sale of the property, there must be an account. It is said, a duty was imposed upon the assignees to call for the account. That is true. It is farther urged, that they could not be traders in new adventures. That also is in a sense true: but the proposition would be rash, that there can be no case, in which they could trade with consent of the creditors; or of the creditors and the bankrupt together. If they had the consent of all persons interested, I do not know, that other persons, with whom they might deal, could make the objection. The duty is not as between them and the other persons; who are not properly to be termed remaining or surviving partners: the destruction of one being, unless it is otherwise provided, a dissolution of the whole partnership; as if by effluxion of time, or by death; except as it may be reasoned upon the effect in bankruptcy of the substitution of assignees.

It

It is however no more the duty of the assignees to settle with the others, than it is their duty to settle with the assignees.

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Is it possible then to say, that upon any rule of law the other partners can take, as sole owners, all the houses, buildings, and stock in trade? The consequence of the destruction and dissolution of the partnership is, that they became tenants in common in each and every article, embarked in it; under an obligation to deal with the whole of the stock, and every article, as the equitable title of the bankrupt and themselves requires; and according to the case of *Fox v. Hanbury* (31) the right is, not to an individual proportion of a specific article, but to an account: the property to be made the most of, and divided. The question then is, whether the other partners have a right to carry on the trade, become theirs exclusively, with the property belonging to the former partner; considering the profit as exclusively their own; and in that concern unquestionably hazarding the loss of that property; if not implicating personal responsibility, indisputably in the course of that trade exposing that property to hazard. It is contended by the Defendants, that, if they dealt only with this property, receiving the money, and turning it, as they do in trade, the demand is only to the extent of a third of the money, made by the first sale. That would give the right to an account to that extent: but there may be a more complicated case; upon the application of funds of their own, mixed with the partnership property. How far the principle is applicable to the case of persons, so mixing, and applying, property of their own, is a consideration, with which I should deal at much hazard, when not apprised of the actual circumstances of the case now before me.

Right upon the Bankruptcy of a partner to an account, not to the proportion of specific articles.

I cannot

(31) *Cowp.* 445. See ante, Vol. I, 236, and the note, 239,

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I cannot go the length of holding, that there may not have been profits, in which these assignees are not entitled to participate. I will not say, that they have a right to participate in all the profits, that have been made. I shall therefore direct an inquiry; to ascertain, whether the profits, that have been made, were made by any and what application of the funds, which the Report states, as constituting the capital in *October*, 1803; or by the application of any other and what funds; and with a direction to the Master to state the circumstances, with reference to profit made by the contract with government. My present notion, without prejudice, is, that the Defendants have a right to put it to the Plaintiffs to take to that contract, or to decline it: but if they choose to take to it, the others cannot prevent them.

The Decree accordingly directed an inquiry, whether there were any and what profits made since the 7th of *October*, 1803, by any and what use or application of, or by means of, the stock in trade and capital of the partnership business; as the Master finds the same to have been constituted; with liberty to state specially any circumstances relative to the stock and capital existing on the 7th of *October*, 1803, or as to any profit, made since, or as to any contract with government, or as to the patents, or any profits, made from such contracts, or by the use of the said patents (32).

(32) See the farther progress of this cause, 1 *Jac. & Walk.* 267. By another Decree, 15th *July*, 1826, it was declared, that the three eighth parts of *Noble* in the partnership ought to be considered as continuing notwithstanding, and after, his bankruptcy. An inquiry was directed, what profits have been made by carrying on the bu-

siness since the date of the last Report; and how much of the profits found by the former Report, and which shall be found to have been made since the last Report, have been made in each and every of the several years, in which such profits have been made; and the consideration of interest upon what shall appear to have been so made

made was reserved till after the Report. It was declared, that the Plaintiffs, as assignees, are entitled to three eighth parts of the profits already reported, and of such farther profits as shall appear to have been made. It was ordered, that the Bank Annuities in trust in the cause, purchased by, or arising from, money brought into Court pursuant to an Order, should be sold; and the produce of the sale be paid to the Plaintiffs, the assignees; and it was declared, that what upon the account shall appear due to the Plaintiffs on account of the profits,

already made, and of which an account is directed, and of any interest, that may be ordered to be paid in respect thereof, is to be paid to the Plaintiffs by the executor of *Collins*; regard being had to the sums already paid to *Noble*, &c. It was ordered, that the partnership patents, and what remains in *specie* of the capital and stock in trade should be sold; and it was declared, that the Plaintiffs are entitled to three eighth parts of the proceeds of such sale, &c. *Post, Featherstonaugh v. Fenwick*, Vol. XVII, 298. *Brown v. De Tastet*, 1 Jac. 284,

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July 20th.

**A**N Exception was taken to the Master's Report; Charitable approving a scheme for the application of a Charity under a Will, dated in 1699; bequeathing to the congregation of Presbyterians, to which the testator belonged 200*l.*: the members of the said congregation giving bond to his wife for payment of 12*l.* a year to her which the Testator belonged, for placing out apprentices two poor boys of such as were Members of the said Congregation, and living in the parish of *St. Martin in New Sarum*.

The Fund, being considerably more than sufficient, the surplus was applied, upon the principle of *Cy pres*, to place out sons of Members of the Congregation within that Parish: 2dly, Such boys in other parishes: 3dly, Daughters of Members of the Congregation, in the same manner: 4thly, Sons of Presbyterians generally; previously to building a School, or other purposes. A proposal in favor of sons of persons, within the parish, of the Established Religion was rejected.

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her for her life; with directions, that after her decease the said members should lay out the said 200*l.* in land; and yearly raise two several sums out of the profits thereof for placing out and putting apprentices two poor boys of such as were members of the said congregation, and that lived in the parish of *St. Martin in New Sarum*.

The fund being considerably more than adequate to the object, specified by the testator, the Master rejected a proposal for extending that object to other parishes, and for the foundation of a school, approving a plan for extending the Charity to children of persons in the same parish of whatsoever religion.

Sir *Samuel Romilly* and Mr. *Wingfield*, in support of the Exception.

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As there is not a sufficient number of boys, answering both parts of the description, children of persons, attending this congregation, and inhabitants of this particular parish, the principle of *Cy pres* must be applied by extending the charity to female children, and to children of Presbyterians in other parishes. The object, approved by the Master, is quite foreign, and must be contrary to the intention. Why may not this Charity be extended to female children; as being nearer the intention?

Mr. *Martin* and Mr. *Johnson*, for the Report.

This bounty is expressly confined to boys. The Master did not think, he should properly execute this Charity by going into other parishes to find children of dissenters: there being a great number of poor families in this parish, professing the principles of the church of *England*. There is no instance, where the words were not imperative, of an application to an establishment, dissenting from that of the country; which would operate as an encouragement to educate children in a different persuasion; a consideration, which had weight in the case

case of *The Attorney-General v. Baxter* (33). The latter part of the scheme proposed, the foundation of a school, is perfectly inconsistent with the intention, that these boys should be put out as apprentices.

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Sir Samuel Romilly, in Reply.

The Decree in *The Attorney-General v. Baxter* was reversed (34); and there is no authority against an application in favor a persuasion, that is tolerated in this country. The principle, certainly very much misapplied in that instance, is, that where religion was uppermost in the mind of the founder, his object shall be executed *Cy pres*. There can be no doubt, that this testator would have preferred daughters of those, who professed his mode of worship, to children of persons of a different religious persuasion. His object in specifying this parish was only, that the persons should be neighbours of this place; as members of this congregation must be: probably residing in some adjoining parish. As to the latter part of this proposal, giving education to these children, apprenticeship was in his view only as a mode of doing them benefit; and probably, if they could not be placed out as apprentices, he would have done them good in some other way.

[*333]

The Lord CHANCELLOR.

The description of the objects of this Charity "boys" of such as are members of this congregation, must be taken to mean sons of such persons. This testator has strongly marked, that he did not place his confidence in the management of this trust in any persons but Presbyterians. He states himself to belong to them: he mentions the gentleman, who was Presbyter: he intrusts the duty

- (33) 1 Vern. 248. *Attorney-General v. Hughes*, 2 Vern. 105. 434, *Corbyn v. French. Davis v. Jenkins*, 3 Ves. & Bea. 151. *The Attorney General v. Fowler*, ante, 85, and the note, ante, Vol. IV, 433, note, 88.

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duty to the members of the congregation; and his primary view undoubtedly was to take such individuals, being members of that congregation, as lived in that parish: but I am satisfied, that, as between the two objects of residence in that parish, and being sons of members of the congregation, he intended to give the benefit to the latter.

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This is a body, known to, and tolerated by the law; and it is the duty of the Court, and of the Crown, where \*the distribution is in the Crown, by Sign Manual (35), to distribute an unexpected surplus *Cy pres* the object, to which the fund was originally given; and, if there are no legal objections, or objections, arising out of considerations of policy, the surplus must be applied as near as can be to that object, which the testator meant to prefer. It would be very inconsistent with his intention to hold, that it might be applied in placing out, as objects of his bounty, children of persons of different religious persuasions: the *Roman Catholic*, the *Jewish*, or even the church of *England*: his object being children of persons, professing the same religious worship, that he professed. It has happened, that the profits of the land, purchased with the fund, which he destined to this purpose, amount to much more than sufficient to place out two boys. As the property is not to go to the heir (36), but it is to go as near as can be to the first object, sons of members of this congregation within this particular parish, if such boys cannot be found in that parish, his next object, applying the doctrine of *Cy pres*, is sons of members of that congregation, whether living in that parish, or not, and, if both those objects shall not be sufficient to exhaust the whole fund, the question then will be, which member of the description is to be preferred; that, which speaks

(35) *Moggridge v. Thackwell*, ante, Vol. VII, 36. the note, p. 9. 4 Bro. C. C. 103. *Ex parte Jortin*, ante,

(36) *Attorney General v. Tonna*, ante, Vol. II, 1, and Vol. VII, 340.

speaks of boys in that parish; or that, which points out sons of members of that congregation; recollecting, that he describes it as a congregation of Presbyterians; and, if according to the policy of the law, as it has been acted upon, charitable institutions will be enforced in favor of persons of this description, I cannot see, why the principle is not to be followed throughout in the application of the *Cy pres* doctrine.

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The consequence is, that if boys, sons of members of this congregation, cannot be found, living in this parish, or not, the application must be for boys, answering that material object in the view of this testator: viz. sons of Presbyterians. The specification of this parish denotes a local preference. It will therefore be more proper to take boys, living in the city of *Sarum*: but I see nothing to confine it. If the fund should prove so considerable, that the Court cannot abide by the description, taken altogether, that will not justify going to the greatest distance in the first instance: but there is nothing, confining the application: if necessary to the execution of the object. I think also, that the Court would not disapprove, as an execution *Cy pres*, a provision for putting out apprentices girls, who are the children of members of this congregation, rather than go out of it; if boys cannot be found, answering both descriptions; either in that parish, or in any other. But after the application to daughters of members of this congregation, before you can go to building a school, and other purposes in the scheme, you must go to boys, sons of Presbyterians out of *Sarum*.

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The scheme was directed to be reformed accordingly; without another reference to the Master; by taking, 1st, boys, sons of members of the congregation within the parish: 2dly, sons of such members in other parishes: 3dly, daughters of members of the congregation, in the same way: 4thly, sons of Presbyterians, generally.

1868.

JAMES v. DEAN.

*Aug. 2d, 3d.*

Request of leaseholds for years, determinable upon lives, for life, with remainder over, for all the residue of the term and interest the testator shall have to come therein at his decease.

The term expired in the life of the testator; who continued to hold; and paid half a year's rent before his death, as tenant by the year.

Upon the general words, unrestrained, comprising the interest from year to year, and the inten-

**T**HIS cause (37) was re-heard upon the Petition of the Defendants.

Mr. *Richards*, Mr. *Hart*, and Mr. *Cooke*, for the Plaintiffs,

Sir *Samuel Romilly*, Mr. *Leach*, and Mr. *Dowdeswell*, for the Defendants, contended, that the Decree, pronounced by the *Lord Chancellor*, was erroneous. The ground, upon which the Bill was dismissed at the *Rolls*, of which your Lordship was not apprised, the case not being published, when the appeal was heard, is, that the testator had no intention to pass any thing, except the term, which he then had; the *Master of the Rolls* considering it, as if the testator had after the execution of his Will renewed the lease. Upon the first part of this clause, giving these premises in *Vine Street, Lambeth*, to the wife for life; for all the residue of his term and interest therein, if it stopped there, the interest given being gone, the new lease, a thing perfectly distinct, could not pass. The question is, whether by the subsequent words he intended to give any thing more; and the proposition that must be maintained, supposes the singular intention, to give different estates to the tenant for life and to the remainder-man: whether the words

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(37) Reported ante, Vol. XI, 383.

tion upon the whole Will, a subsequent lease, obtained by the Executrix, the widow and tenant for life under the Will, was held subject to the uses of the Will; as the residue of the term at his death, however short, would have been.

"for all the residue of the term and interest I shall have to come therein at my decease" mean the interest in that term, or the interest in the land: the latter construction enlarging the preceding disposition; which applied only to the remainder of the term he had, when he made his Will; and extending it to any future term and interest, that he might acquire. It is at least very ambiguously expressed; and by no means clear, that he had in contemplation a future interest to be acquired; and intended to devise that interest. In other parts of the Will he disposes of interests under similar circumstances; estates held for years under a derivative title from the church of *Canterbury*; giving expressly in one instance, "for all such term and terms of years as I shall have to come therein at my decease;" and in the other "for all such term, estate, or interest as shall be then," at his wife's decease "to come therein;" and expressly providing for the fine and fees of renewal. The absence of such a provision as to the premises in *Vine Street* shews, that he meant only the term he then had as the subject of that disposition. The first bequest, to *Ann Charlton*, contains a proper description of such interest, as the Defendants contend they are entitled to in the premises in *Vine Street*. Can he be supposed, using these very different words, to have precisely the same meaning? When he intended to give the future interest in the renewed lease, he clearly and correctly expressed that purpose; and made provision accordingly: but it must be admitted, that he has in the subsequent disposition of the premises, purchased from *Kock*, used words, applicable only to the interest he then had; though he has afterwards directed his wife, to whom he gave those premises for her life, to pay for renewing the lease at the usual times during her life. The strong ground, however, upon which the judgment at the *Rolls* stands, is the construction of the clause itself; the expression "the same"

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"same" used as to the remainder, being explained by the preceding part. The safer construction is to interpret a subsequent equivocal expression by a preceding plain expression than to controul the former by the latter.

As to the other part of the case, the new interest, acquired by the testator cannot be distinguished from that, which in the case of *Doe v. Porter* (38) was held to pass to representatives: if therefore, the testator intended to give more than the term he then had, the consequence must be, that the new interest passed, and the enlarged interest, afterwards acquired, must be considered as acquired for the benefit of all persons, entitled under the Will.

The Reply was stopped by the Court.

*The Lord CHANCELLOR.*

I stated upon the former occasion, very unfeignedly, that it was with difficulty I brought my mind to a different conclusion from that of the *Master of the Rolls* upon this case. I felt the necessity of looking to the whole of the Will for the construction; and it is possible, that the legal conclusion, to which I then came, and find myself bound to adhere, may not fulfil the actual intention of the testator. The judgment at the *Rolls* proceeds upon this short ground; as I collect it from the Report; that the testator intended to give only the interest he then had in those premises; and did not contemplate any future interest, that he might by possibility acquire. The *Master of the Rolls* lays down, with great accuracy in point of Law, that, if a man bequeaths a lease, or the premises he holds on lease, and the lease expires, the legatee is not entitled; though another lease exists at the death of the testator; though he may certainly so express his intention

A renewed lease does not pass by a previous Will, bequeathing the lease, or the premises held on lease.

as

as to pass any interest, existing at his death. At the time, or rather previous to the time, when the case of *Abney v. Miller* (39) was determined, a distinction was attempted with reference to these leases; that under a bequest of "the premises," the lease afterwards expiring, and being renewed, the renewed lease would pass: but it would not under a bequest of "the lease." That distinction was long ago destroyed; and Lord *Thurlow* in *Hone v. Medcraft* (40) put an end to all difficulty upon it.

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The two parts of this clause, relating to these premises in *Vine Street, Lambeth*, taken separately, as distinct bequests, admit no doubt. Considering the first as an independent, separate, substantive, disposition, if that lease, which the testator then had, and which he described as *his* term and interest, had expired, and a new lease had been taken, his wife would have taken nothing. It is however equally clear, that if the following part of the clause had stood as a substantive, independent, bequest, unexplained by the context, whatever was the term or interest he had at his decease would have passed under that description to the Plaintiffs: if therefore the lease had expired, and a new lease had been taken, that new lease would unquestionably have passed by that clause to the Plaintiff after the decease of the testator's wife; who under the residuary clause would have been entitled for her life to that new lease under the description of the term and interest to come at the testator's decease.

The *Master of the Rolls* appears to have been struck by the expression "the same;" and reasons thus upon it.

(39) 2 Atk. 593.

(40) 1 Bro. C. C. 200.

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it (41), "that is, the same premises he then held from Sir *William East*;" in which I perfectly concur; but upon the words, that follow "for all the residue of the term and interest I shall have to come therein at my decease" proceeds thus: "In what? Those premises I now hold by lease from Sir *William East*."

Upon these words, I confess, my opinion is different; and I conceive, that it was the interest he should have at his decease, and not the interest he had then in the premises, that would have passed under those words, unless explained.

Admitting the general rules, to which I have referred, and which, as all others, must be applied, as upon the context and true meaning of the Will they may be duly applicable in each instance, I certainly decided a new point in this case, and a point of great importance, as forming a head of equity; as I agree, that, if no interest in the renewed lease would pass to these persons, no interest could pass in the testator's actual title, existing at the time of his death; which was merely the consequence of his holding over, after the expiration of the term, as tenant, either at will, at sufferance, or from year to year. My opinion was, that if he was tenant at will, or at sufferance, the Plaintiff had no case: the death of either party determining the Will; but, as he was tenant from year to year, it came to this extremely nice point; that at the time of his death he might not have more than an interest for three months to pass to his personal representative; and, if the representative, having become tenant for life of that interest, had acquired a lease through the opportunity, afforded him during that short period, my opinion was, that she would be a trustee. The Court of King's Bench having held, that

(41) Ante, Vol. XI, 387.

that a tenancy from year to year is an interest, transmissible to the representatives (42), the consequence is necessary, that the beneficial interest, attaching upon the legal interest, must be held by the representative for those persons, to whom the beneficial interest is given; and, then, if an actual lease had existed at the death of the testator, though an estate to endure but for a year, of which only three months remained unexpired, upon these principles I thought, that could not be distinguished; that, the beneficial interest would attach upon the legal interest in the same way; but that the Plaintiff would have had no case under the former circumstances; unless he would have had a case, if a renewed lease had existed.

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year to year  
is an interest  
transmissible  
to Representatives.

Upon that question, whether this Plaintiff would have taken the interest in that renewed lease, this is an anxious bequest, expressed in very illiterate terms, of all the testator's leasehold estates; making his wife residuary legatee of his general estate. In the bequest to *Ann Charlton* of eight acres, which, it is material to observe, are part of the fifteen acres, first disposed of, the expression is "for all such term and terms of years." Probably he had no farther meaning, when, disposing of the remaining seven acres, he uses the word "interest:" but the Court, construing the Will, lays much stress upon that word; and it is observable, that in the case of *Abney v. Miller* Lord *Hardwicke* says (43), the testator, meaning to pass the renewed lease, should use that word. The direction as to renewal of the lease of the fifteen acres is perfectly inapt; if the renewed lease was not to pass.

In the disposition of the seven acres to his wife for her life he has not used any words, that would pass the renewed

(42) *Doe v. Porter*, 3 Term Rep. 13. (43) 2 Atk. 509.



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renewed lease: but it is clear, that his three nieces would have taken the interest in those premises after her decease absolutely; though the lease had been renewed after the date of the Will. The question upon that would have been, whether as to those premises, which the testator had bequeathed, not until after the decease of his wife, but for all the interest, which he should have to come therein at her decease, he did not intend, that she should have an interest for life; and, notwithstanding the general rule, I think, the construction, that such must have been his meaning, is not too strong. The circumstance, however, that she is the residuary legatee, makes that consideration immaterial: but it would be very difficult to maintain, that, as the operation of the clause as to his wife was, that she would take an interest only in that lease, which existed at the date of the Will, therefore those, who were entitled in remainder, should take an interest equally limited; though the testator had declared, that they should take every interest, which should exist at her decease. It is much safer to abide by the plain words, than to conjecture by reasoning upon other words, which do not necessarily controul them.

Considerable reliance was placed by the Defendants on the direction as to the fine and fees of renewal as to the eight acres and the seven acres. They are to be paid partly by persons, having the absolute interest: but they are also to be paid, as to the seven acres by the testator's wife during her life; and as to her that direction was necessary; otherwise, being entitled for her life only, she would not have been bound to renew; and the object in imposing that direction upon the person, entitled absolutely to the other part of the premises, was to carry it on as to the seven acres.

In

In the clause as to the premises upon which the question arises, the word "therein" at the close of the bequest to the wife for her life, has precisely the same meaning as in such messuages, lands, &c.; as it is put by the *Master of the Rolls*. The question is, whether upon this context I can hold, against the obvious meaning of the words, that the testator meant less than those words express. There is no doubt, that the words in the former part of the Will must carry the renewed lease. The bequest to the Plaintiff after the decease of the wife is expressly for all the residue of the term and interest he should have to come therein at his decease; and, connecting that with the preceding words, I should not be afraid to hold, that they may carry more than they directly import; which however it is unnecessary to determine; as the wife as residuary legatee must have that interest. The question then is, whether I am authorized to cut down the obvious and legal construction of the words, occurring in this clause, by conjecture upon other parts of the Will.

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The construction, that I made before, would perhaps be a surprize upon the testator: but I did upon great consideration take that to be the legal construction; and I have not heard any thing, that induces me to alter that judgment.

The Decree was affirmed (44).

(44) See *Randall v. Russell*, 3 Mer. 190.

1808.

July 29th.

Aug. 1st.

Interpleader upon notice of a variety of claims by persons, among whom an entire charge upon an estate was split; though no suit instituted; and but one legal right of entry: the principle being, not merely that the payment cannot be safely made, but that the party, entitled to be discharged by a single payment, should not be harassed by a number of suits.

ANGELL v. HADDEN.

BY indentures, dated the 20th of *June*, 1788, *Charles Cole*, in consideration of 665*l.* purchased from *Nehemiah John Reed* and *Ann*, his wife, an annuity of 95*l.* for the term of ninety-nine years, if *Ann Reed* should so long live; secured by bond, and an assignment of a rent-charge of 600*l. per annum*, secured to *Ann Reed* by her marriage settlement, dated the 13th of *September*, 1786; by which the said rent-charge, to which she was entitled for her life under the settlement, made upon her marriage with her first husband *Benedict Angell*, and under his Will, subject to a trust term of five hundred years, was assigned to trustees; upon trust, as to one moiety, subject to the appointment of *Ann Reed*, for her separate use; and as to the other moiety to pay to *Nehemiah John Reed*, during the joint lives of him and his wife; and, in the event of her surviving him, upon the trusts declared concerning the first moiety.

Several other annuities were afterwards granted, by *Reed* and his wife, to different persons, secured also upon the rent-charge of 600*l. per annum*. After the death of Mr. *Reed* his widow married *Benjamin Hadden*; and gave notices to the Plaintiff, tenant for life of the estates, charged with the rent-charge of 600*l. per annum*, not to pay the several annuities, that had been granted by her. The Bill therefore was filed; stating, that the several annuitants insist, that the Plaintiff *Angell* is bound to pay the annuities; that *Ann Hadden* in her own name and that of *M^cFarlane*, the surviving trustee of the rent-charge, had distreined upon the other Plaintiff *Smith*, one of the tenants of the premises; charging, that the Plaintiff *Angell* is ready and desirous to pay the arrears

arrears and annuities ; but is unable to do so with safety by reason of the inconsistent claims aforesaid ; and praying therefore, that the Defendants may interplead, and an injunction against proceeding in the distress.

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A Motion was made, upon the Answers coming in, to dissolve the injunction, which had been obtained (45).

Sir Samuel Romilly, Mr. Bell, Mr. Wingfield, and Mr. Plowden, for the different Defendants: Mr. Leach, Mr. Thomson, Serjeant Palmer, and Mr. Owen, for the Plaintiff.

The Lord CHANCELLOR.

The case of *The Duke of Bolton v. Williams* (46), was not, according to one of the Reports at least (47), upon one Bill of interpleader, but upon two Bills, against several persons, setting up claims against the estate. The first objection that has been made in this case, is, that this is a Bill of interpleader against a great number of persons: but that is no objection. As the terre-tenant has a right to consider the whole charge as one annuity, charged upon his estate, the persons, entitled, to several portions of that charge, cannot complain, if he applies to this Court; representing, that he is desirous to pay this entire charge upon his estate; which they have thought proper to split into parts.

The next objection is, that here is no suit instituted. That is no objection; if the claims are made (48). Here is

no

(45) It has been since held, that in the case of Interpleader an Injunction cannot be obtained on Certificate of the Bill filed and Affidavit. *Craggon v. Symons*, 3 Madd. 120.

(46) 3 Bro. C. C. 297. Ante, Vol. II, 138.

(47) Ante, Vol. II, 138.

(48) Ante, Vol. II, 107, and the note.

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no more than one legal right of entry, in the trustees of the term; which *M'Farlane* has not got in: but I doubt extremely, particularly upon the case of *The Duke of Bolton v. Williams*, whether, where a party has a great variety of claims made upon him, he is, before he makes an attempt in this Court to render himself safe, to be called upon to discuss, how many of those claims can be sustained; the principle of the relief going to protect him, not only from being compelled to pay; but also from the vexation, attending the discussion of all the suits, that may be instituted. It was in some degree upon this ground, that Lord *Thurlow* in *The Duke of Bolton v. Williams* granted a perpetual injunction against the executors of the annuitants; which did not properly belong to a strict Bill of interpleader; for, though he could very well decide upon that, to whom the arrears were to be paid, yet as sums, on account of the future payments, would continually be coming into controversy, unless he had restrained them from proceeding, if they could have maintained any action, which was very doubtful, he could not have given that complete relief, which was necessary to deliver the Plaintiff from the vexation to which he would have been liable. Lord *Rosslyn* follows that; holding, that the Plaintiff had a right to have all the parties, to whom she had made assignments, brought here together; and was not to be put to try with each of them the question upon his claim. The trustee refused to receive the annuity; and several claims were made upon the Duke of *Bolton* by persons, several of whom might have sued; using the name of the trustee; and the object of the Duke in coming to this Court was, as he might be harassed by all those suits, to have determined, for whom *Law* was a trustee. The reasoning of Lord *Rosslyn* upon it is in print: that of Lord *Thurlow* I heard: this being one of the cases decided by his Lordship out of Court upon resigning the Great Seal; and the meaning of both

both was, that, though the Duke, paying the trustee, if he would have received it, after notice from persons, representing themselves as *Cestuis que* trust, that they meant to insist in equity, that they would intercept that payment, and receive it themselves, giving notice of the equity, that entitled them to do so, might perhaps have been able to defend himself, yet, if he must discuss that point in two suits, the same principle would justify any number of suits; and the ground of the judgment is, that the Duke held the money for the trustee; if he chose to assert his legal title on behalf of others: but, if he would not assert that title, there was a principle of jurisprudence in this Court, entitling the Duke to say, he had the money ready to be handed over to any person, who had the right to it; and, all these persons making claims, to desire the Court to tell him, to whom he ought to pay it. The ground therefore was, not that he might not have been able by great attention and caution to make himself secure; but that he might secure himself by one suit, instead of perhaps forty; as one payment ought to discharge him.

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ANGELL  
v.  
HADDEN.

Even if I thought otherwise of that case than I do, I could not upon an interlocutory motion contradict it. The consequence is, that this Plaintiff is entitled to come here, in order to know, to whom he is to pay this annuity and the respective portions of it.

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The Injunction was continued ( 49 ).

(49) Post, Vol. XVI, 202. 2 Mer. 164.

ROLLS.

1808.

June 27th.

Aug. 8th.

LESTER v. GARLAND.

Bequest of residue, in trust, in case *A.* shall within six calendar months after the testator's decease give security not to marry *B.* then, and not otherwise, to pay to the children of *A.* with a proviso to go over, if she shall refuse or neglect to give such security.

A condition precedent. The six months are exclusive of the day of the testator's death: therefore; as he died on the 12th of *January*, between eight and nine

in the evening, a security given on the 12th of *July*, about nine in the evening, was held sufficient.

No general rule, in computing time from an act or an event, that the day is to be inclusive or exclusive; depending on the reason of the thing, according to the circumstances.

**S**IR JOHN LESTER by his Will, dated the 25th of *December*, 1804, after several dispositions, gave and bequeathed all the residue of his personal estate to trustees; upon trust, that in case his sister *Sarah Pointer* shall not intermarry with *A.* before all or any of the shares, hereinafter given to her children, shall become payable, and in case his sister shall within six calendar months after his decease give such security as his trustees or the survivor, &c. shall approve of, that she will not at any time intermarry with *A.* or, in case she shall so intermarry with him after the periods, when all or any of the shares, hereinafter bequeathed to her children, shall become payable and shall be paid to him, her, or them, that she will within six calendar months after such marriage pay the amount of such share or shares, or cause any child or children, who shall have received his, her, or their, share or shares, to refund the same to the trustees, then, and not otherwise the trustees were directed to pay such residuary estate to the eight children of *Sarah Pointer*, at the age of twenty-one, or marriage, with benefit of survivorship; with a proviso, that in case his said sister shall intermarry with *A.* before all or any of the shares of her said children shall become payable, as aforesaid, or shall refuse or neglect to give such security, as aforesaid, then and in either of the said cases he directed the sum of 1000*l.* a-piece only with interest

interest from his death or failure of his issue, as aforesaid, to be paid to the children of his sister; and, subject thereto, gave his residuary estate to the children of his other sister *Amey Garland*.

1806.  
LESTER  
v.  
GARLAND.

The testator died upon the 12th of *January*, 1805, between the hours of eight and nine in the evening. On the 12th of *June* the trustees gave to Mrs. *Pointer* notice, to give the security, required by the Will, on or before the 12th of *July*. Mrs. *Pointer* on the 19th of *June* gave a written notice to the trustees, that she would give no security: but on the 6th of *July* she gave another notice in writing; desiring to know the nature and extent of the security required; declaring, that she was then willing to give them her bond; which was the only security she had to offer. In consequence of that communication on the 11th of *July* the solicitor for the trustees called upon her for the purpose of agreeing on the terms of the bond; when she requested farther time: but afterwards by a written notice, dated on that day, she refused to execute. On the next day however, the 12th of *July*, upon the remonstrances of the solicitor for the trustees, she did execute the bond about seven o'clock in the evening. On the same evening two of the trustees declared their approbation of the security: but the approbation of the third, being at *Bristol*, could not be obtained until some time afterwards: Mrs. *Pointer* having executed the bond at her residence in the neighbourhood of *Poole*.

The Bill was filed by the infant children of *Amey Garland*, claiming under the forfeiture; upon the ground, first, that after the notices, given by Mrs. *Pointer* upon the 19th of *June* and the 11th of *July*, she could not retract; secondly, that the security was not executed within the time,

Mr.



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Mr. Richards, Mr. Alexander, and Mr. Daniel, for
 the Plaintiffs.

There is no doubt, that this is a condition precedent.

First, Mrs. *Pointer* was concluded by her express refusal to give the security required: if, as the Defendants insist, she could retract that refusal, secondly, the security she has given by the bond, dated the 12th of *July*, was not given within the time: the period of six months expiring with the 11th: the day, on which the testator died, being included in the computation, according to the case of *Castle v. Burditt* (50), and many other authorities: the whole day, in these cases, being either inclusive or exclusive; without regard to the hour, at which the act is done, or the event happens. The old cases upon this point, collected in *Viner* (51), are contradictory: but the late decisions, *The King v. Adderley* (52), down to *Castle v. Burditt*, following *Clayton's Case* (53), *Bellasis v. Hester* (54), and older cases, are uniform; that, where the computation is to be from an act done, the day is inclusive. In the case of *Pugh v. The Duke of Leeds* (55) it was considered a question of intention; and this is a mere question of construction upon this Will; under which both parties claim as volunteers.

Mr. Thomson and Mr. Roupell, for the Defendants,
 the Children of Mrs. *Pointer*: Sir Samuel Romilly,
 Serjeant Palmer, and Mr. Newbolt, for the
 Trustees.

Admitting, that this is a condition precedent, the Plaintiffs must establish, that the day of the testator's death is necessarily included in the computation. No alteration has taken place in the law upon this subject. It is true,
 for

(50) 3 Term Rep. 623.

(53) 5 Co. 1.

(51) 20 Vin. Ab. tit. Time.

(54) 1 Lord Raym. 280.

(52) Doug. 463, 2d edit.

(55) Comp. 714.

for some purposes the day may be taken to be either inclusive or exclusive; of which there are instances both ancient and modern; as, to prevent the penal consequences, in an action against the hundred, in which a robbery has been committed, the day is taken inclusive, according to the strictest construction: *Norris v. The Hundred of Gauris* (56); and upon the same principle, from the penal consequence, the party prevailed in *The King v. Adderley* (57). But in all cases, at which the Court looks with favor, the opposite construction is made; with the view to give validity to the transaction; as in the case of enrolment under Acts of Parliament the day is always exclusive; as more favourable to the party by giving validity to the transaction. A similar distinction is taken by Mr. *Powell* (58), as the result of the authorities; that, where the act is to confer an interest, or to give an enlarged or more beneficial enjoyment, the day is to be taken either inclusive, or exclusive; and upon the same principle in *Pugh v. The Duke of Leeds* the Court of King's Bench held, that, to effectuate the intention, or to promote and uphold the spirit and meaning of an Act of Parliament, the words "from the date" or "from the day" should be construed either inclusive or exclusive; which was followed in *Ex parte Fallon* (59); where Lord *Kensington* puts the case of an instrument, to be enrolled within one day after execution; which could not be taken to mean the fragment of the day of execution. The case in *Dyer* (60) is, though strong, conformable to what is stated in the Second Institute (61). The period of six months in the case of lapse to the ordinary is exclusive of the day of avoidance (62); and upon the Statute of

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| (56) <i>Hob.</i> 139. 1 <i>Brownl.</i> | (59) 5 <i>Term Rep.</i> 283. |
| 156. 2 <i>Roll's Abr.</i> 520, pl. 8. | (60) <i>Dy.</i> 218. |
| (57) <i>Dougl.</i> 463, 2d ed. | (61) 2 <i>Inst.</i> 674. |
| (58) <i>Powell, on Powers,</i> | (62) 2 <i>Black. Com.</i> 276. |
| 532. | |

1808.
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*Edward I* (63), as to alienations in mortmain, the year is exclusive of the day. In all the cases, where the computation has been from an act done, including the day, the act has been one, to which the party, against whom the time was to run, was privy: an act either by him, or to him; and in the case in *Hobart* stress was laid upon the circumstance, that he might immediately bring his action. It is now settled (64), that the day, on which a Bill of Exchange is presented, is exclusive; though the contrary opinion formerly prevailed; and in pleading *Oyer* the two days are exclusive of the day, on which it is demanded (65).

This is in the nature of a forfeiture; and a forfeiture of the most odious description. The testator had two objects: to give the residue of his personal estate to the children of Mrs. *Pointer*; and to prevent her marriage with a particular person; and the penalty, imposed upon her, to secure the latter object, is the loss of her children's fortune. The intention cannot be considered indifferent between these parties. These children were clearly the first object; and it cannot be supposed, that he would have given up that object, because the security was taken upon the 12th of *July*, instead of the 11th; or that he contemplated this subtle distinction; which is inconsistent with the vulgar acceptance of the words. The general principle being against the fraction of a day, the computation, most material, and most likely to fall in with the general transactions of mankind, is to begin from the last moment of the day, rather than from the first. If the direction had been to do an act within one day after the testator's death, could the day, on which he

(63) Stat. 7 *Edw. I.*

(65) *Page v. Divine*, 2 *Term*

(64) *Bayley, on Bills of* *Rep.* 40.

*Exchange*, &c. 37.

he died, be possibly considered as that day, on which the act must be done? If this testator had died at the hour of eleven at night: could the remaining hour be accounted a day, consistently with the declared intention to allow the full period of six calendar months?

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Mr. *Richards*, in Reply.

In the case of enrolment the interest passes by the execution of the instrument; and then every possible construction is made to prevent divesting the right, vested in a purchaser. In the case of the bill of exchange the exception of that instrument depends upon the law of merchants. This is a mere question of intention: both parties entitled equally to favor. The fraction of a day is never allowed in the computation of time; and as under these words the remainder of the day of his decease cannot be excluded, there is no other course than to include the whole of that day.

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*The MASTER of the ROLLS.*

The question in this cause is, whether Mrs. *Pointer* within six calendar months after the decease of her brother gave the security, required by his Will, as the condition, upon which her children should take the benefit of his residuary estate. He died upon the 12th of *January*, 1805, at a quarter before nine o'clock in the evening. The security required was executed upon the 12th of *July* following, about seven in the evening. Computing the time *de momento in momentum*, six calendar months had not elapsed: but it is admitted, that this is not the way, in which the computation is legally to be made. The question is, whether the day of Sir \**John Lester's* death is to be included in the six months, or to be excluded: if the day is included, she did not,

[ \*254 ]

if

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if it is excluded, she did, give the required security before the end of the last day of the six months; and therefore did sufficiently comply with the condition.

In the time from the presentment of a bill of exchange the day of presentment exclusive.

Other instances; where the day of an act done, or an event happening, is sometimes inclusive, sometimes exclusive.

It is said for the Plaintiffs, that upon this subject a general rule has been by decision established; that, where the time is to run from the doing of an act, (and for the purpose of this question it must extend to the happening of an event) the day is always to be included. *Whatever dicta* there may be to that effect, it is clear, the actual decisions cannot be brought under any such general rule.

The presentment of a bill of exchange to the sight of the drawee is an act done; and yet it is now settled, that the day, upon which it is presented, is to be excluded; though it had been ruled otherwise by three Judges of the Court of Common Pleas against the opinion of *Treby*, Chief Justice. But the law is now clearly settled against that decision. The Annuity Act (66) provides, that the twenty days shall run from the execution of the deed. The execution of the deed is undoubtedly an act done: yet according to the decisions the day, upon which the deed was executed, is excluded. So, in a case in the House of Lords, in 1796, in which I was Counsel, *Mercer v. Ogilvie*, where the question was, whether within the meaning of the Act of Parliament in *Scotland* (67) "for regulating deeds done on death-bed" a man had lived sixty days after *the making and granting of the deed*, it was held, that the day, on which the deed was *made and granted*, was to be excluded.

In the cases of alienation in mortmain the alienation is an act done; and yet according to a case in *Brooke* the

(66) Statute 17 Geo. III. 53 Geo. III. c. 141. See the c. 26. Repealed by statute note, ante, Vol. II, 36.

(67) 1696, c. 4.

the day is excluded in the computation of the year, which the immediate lord has to enter for the forfeiture. Mr. Justice *Blackstone* lays down, that the day of the avoidance of a living, which must be by an act done or an event happening, is excluded in the computation of the six months, which the patron has to present. I do not however find that position in the Second Institute, to which the learned Judge in his Commentaries refers.

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The cases, chiefly relied on upon the other side, are *The King v. Adderley* (68); where the day, on which the sheriff's office expired, was held to be included in the six months, after which he is not to be called on to return process. The Court of King's Bench first thought the day excluded; but, chiefly upon the ground, that the Act (69) was made for the ease of Sheriffs, and ought to be construed favourably for them, afterwards determined, that it was to be included: the case of *Castle v. Berriditt* (70); where the day, on which the notice was given, was included in the month, that was to elapse before the action could be brought: the case of *Glassington v. Rawlins* (71); where contrary to the first opinion of Mr. Justice *Lawrence*, it was determined, that in the computation of two months, creating an act of bankruptcy, the day of the arrest is to be included: lastly, the cases upon the Statute of *Hue and Cry*; in which the day of the robbery is included in the year, which the party robbed has to bring his action against the hundred; to which might have been added the ease of continual claim. To prevent a descent from barring an entry, the claim must be renewed within a year and a day. Lord *Coke* says, the year and day shall be so accounted,

(68) *Doug.* 463, 2d edit.

(70) 3 *Term Rep.* 623.

(69) Stat. 20 *Geo.* II. c. 37.

(71) 3 *East*, 407.

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accounted, as the day, whereon the claim was made, shall be accounted one (72).

Upon these cases Mr. Serjeant *Palmer* made an observation, that applies correctly to all of them, except the first; viz. that the act done, from which the computation is made inclusive of the day, is an act, to which the party, against whom the time runs, is privy; and, as he has unquestionably the benefit of some portion of the day, there is the less hardship in constructively reckoning the whole of it as a part of the time allowed him: whereas in this case the event was one totally foreign to the party, whose time for deliberation was to begin to run from that event. Mrs. *Pointer* could not reasonably be supposed to have any opportunity of beginning on the day of Sir *John Lester's* death the deliberation, which was to govern the election, ultimately to be made. In the case of a notice of an action, to be brought, the party necessarily knows the time, at which he is served with the notice; and may immediately begin to consider of the propriety of preventing the action by tendering amends. So, a person arrested may immediately set about endeavouring to procure bail; and the same observation applies to the cases of the man robbed and of continual claim. But one is not necessarily conversant of the death, still less of the contents of the Will, of another. Here, though it is impossible consistently with the words of the Will to postpone the commencement of the time until the period of actual notice, yet it is not reasonable to include a day, useless to Mrs. *Pointer* for the purpose of deliberation; unless there is some clear, imperative, rule, making it absolutely necessary. She had a very important choice to make: one way debarring herself of her natural right of marrying whom she pleased: the other

other excluding her children from a considerable fortune. That is not a case for narrowing the time allowed, for the decision.

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It is not necessary to lay down any general rule upon this subject: but upon technical reasoning I rather think, it would be more easy to maintain, that the day of an act done, or an event happening, ought in all cases to be excluded, than that it should in all cases be included.

Our law rejects fractions of a day more generally (73) than the civil law does. The effect is to render the day a sort of indivisible point; so that any act, done in the compass of it, is no more referrible to any one, than to any other, portion of it; but the act and the day are co-extensive; and therefore the act cannot properly be said to be passed, until the day is passed. This reasoning was adopted by Lord *Rosslyn* and Lord *Thurlow* in the case before mentioned of *Mercer v. Ogilvie*. The ground, on which the judgment of the Court of Session was affirmed by the House of Lords, is correctly stated in the fourth volume of the Dictionary of the Decisions of the Court of Session. In the present case the technical rule forbids us to consider the hour of the testator's death at the time of his death; for that would be making a fraction of a day. The day of the death must therefore be the time of the death; and that time must be past, before the six months can begin to run. The rule, contended for on behalf of the Plaintiffs, has the effect of throwing back the event into a day, upon which it did not happen; considering the testator as dead upon the 11th, instead of the 12th, of *January*; for it is said, the whole of the 12th is to be computed as one of the days subsequent to his death. There seems to be

Our Law rejects fractions of a day more generally than the Civil Law.

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(73) See the note, ante, Vol. XIV, 554, where it is admitted in bankruptcy.

1808.
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 LESTER  
 v.  
 GARLAND.

no alternative but either to take, the actual instant, or the entire day, as the time of his death ; and not to begin the computation from the preceding day.

But it is not necessary to lay down any general rule. Whichever way it should be laid down, cases would occur, the reason of which would require exceptions to be made. Here the reason of the thing requires the exclusion of the day from the period of six months, given to Mrs. *Pointer* to deliberate upon the choice she would make ; and upon the whole my opinion is, that she has entered into the security before the expiration of the six months ; in sufficient time therefore to fulfil the condition, on which her children were to take.

1808.  
 Aug. 5th, 6th,  
 8th, 9th.

### CHURCH v. BROWN.

Under an agreement for a lease the lessor is not without express stipulation entitled to a covenant, restraining alienation without licences as a proper and usual covenant.

**T**HOMAS WORSFOLD, of *Croydon*, grocer, entered into an agreement in writing, dated the 3d of *December*, 1798, with the Plaintiffs *Church* and *Upton* to grant them a lease for twenty-one years from *Christmas* next, of a house, warehouse, and other premises in *High Street, Croydon*, at the yearly rent of 40*l.*, clear of taxes, except the land tax ; and the Plaintiffs agreed to accept the said lease and to pay the rent ; which lease it was agreed should contain a power for the Plaintiffs to determine the lease at the expiration of the first seven or fourteen years on notice : and the lease was to contain a covenant on the part of *Worsfold*, that he should not at any time within ten years set up, exercise,  
 or

or follow the trade of a tea-dealer or grocer within four miles from *Croydon*, but should, on the contrary, render his assistance to the Plaintiffs in the business.

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CHURCH  
v.  
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In pursuance of the agreement, in *January*, 1799, the Plaintiffs entered; and carried on the business of a grocer in the premises in partnership; until they agreed to dissolve the partnership; that *Church* should continue the business on his separate account; and the lease should be granted to him alone. *Worsfold* afterwards sold the premises to the Defendant, a grocer, in *Croydon*, in fee.

The Bill, filed in *November*, 1803, prayed, that the Defendant may be decreed to execute a proper lease, conformable to the agreement.

Under a decree, directing the Master to settle a lease, a draft was carried in by each party, varying only in this respect; that the draft, proposed by the Defendant, extended the proviso for re-entry for non-payment of rent or breach of covenants to the following case; viz. if *Church* or *Upton* or either of them, their or either of their executors or administrators, shall assign over this present indenture of lease or their term or interest therein or any part thereof, or demise, let, or part with, the demised premises or any part thereof, to any person or persons whomsoever, without the licence of *Brown*, his heirs or assigns, in writing, first obtained; or if *Church* and *Upton* or either of them, &c. should become bankrupt, or make any assignment for the benefit of their or his creditors.

The Master's judgment being against the insertion of that clause, an Exception was taken to the Report.

1806.  
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 CHURCH
 v.
 BROWN.

Sir Samuel Romilly, and Mr. Wetherell, in support of the Exception, referred to the two late cases, *Vere v. Loveden* (74) and *Jones v. Jones* (75); in which this subject, though not determined, was much considered by the *Master of the Rolls*. They urged, that Lord *Thurlow*'s distinction in the case of *Henderson v. Hay* (76) between common and usual covenants is not very intelligible: nor, what are incidental covenants: in the nature of a demise at common law it is not incidental, that there should be any covenant whatsoever; even for payment of rent; that the subsequent decisions (77), by Lord *Kenyon* at *Nisi Prius*, and by the Court of Exchequer, in favor of a covenant, restraining alienation without licence, as reasonable and usual, are against the opinion, expressed in that case; which however, it was said, ended in a compromise; and, though there is no instance, where such a covenant was inserted without an agreement for usual covenants, that cannot make a difference; as a proper lease must have the usual covenants. Upon the terms of this agreement, and the nature of the subject, the intention must have been, that there should not be a change of the tenant without consent. The lessor, letting this shop to persons of the same trade, that he followed, and covenanting not to carry on that trade within four miles for ten years, might have looked to the possibility of his returning to his trade in that shop; especially as the lessees had an option to determine the lease at the end of seven or fourteen years. Under such circumstances it was important to him to guard against any alteration. Something also may be presumed, from the circumstance, that the word "assigns" is not to

(74) *Ante*, Vol. XII, 179. 1 *Esp. Ni. Pri. Ca.* 8. *Fol-*

(75) *Ante*, Vol. XII, 186. *kingham v. Croft*, 3 *Anstr.*

(76) 3 *Bro. C. C.* 632. 700.

(77) *Morgan v. Slaughter*,

to be found in this agreement; and seems to have been studiously avoided.

1808.
CHURCH
v.
BROWN.

Mr. *Alexander*, for the Report, observed, that, here was no stipulation for proper or usual covenants, upon which the two last decisions had been made; and which, when confined to the neighbourhood, the *Lord Chancellor* in *Boardman v. Mostyn* (78) held a proper subject of inquiry; though there are in this agreement stipulations for particular purposes, anxiously expressed. All, that had been determined, was, that this covenant is not unfair, unreasonable, or unusual, in the lease of a public house; in which case it may be truly represented as essential and necessary on account of the lessor's interest in the licence; upon which the value of the house depends. The *Master of the Rolls* observes accordingly, that there are many covenants, which it may be very proper for the lessor to take for his protection, but, which, not naturally flowing from the contract to let and take, should be the subject of direct stipulation: but this exception contends, that a provision of this sort requires no stipulation; being, according to Lord *Thurlow's* expression, incidental to every lease.

Sir *Samuel Romilly*, in the Reply, mentioned the case of *Brown v. Raban* (79), in which, at the *Rolls* the evening before, it was decided, that under a stipulation for usual covenants a covenant not to assign without licence should be inserted. The *Master of the Rolls*, who was not, before that judgment was pronounced, apprised, that this point was depending before the *Lord Chancellor*, decided upon the authority of the cases in the Court of *Exchequer* and before Lord *Kenyon*; continuing however to express his own opinion upon the question to agree with that of Lord *Thurlow*.

The

(78) Ante, Vol. VI, 467.

(79) Post, 528.

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v.
BROWN.

The Lord Chancellor.

I came into Court with an extremely strong opinion, that this covenant could not be inserted in the lease: but my mind is most seriously affected, on the one hand, by the very strong reasoning of the *Master of the Rolls* in the two cases (80), that have been mentioned; and, on the other, by the communication, that, notwithstanding that reasoning, the *Master of the Rolls* considers this point bound down by the decision of Lord *Kenyon* at *Nisi Prius* (81), and that single case in the Court of Exchequer (82). No one will suspect me of not giving all due weight to any opinion of Lord *Kenyon*; but I must know a great deal more, than I do, before that determination, at *Nisi Prius*, will decide my judgment upon such a point; and, as to the other case, I have not yet had an opportunity of learning any reasons, that I can represent as satisfactory to my own mind. The case of *Henderson v. Hay* (83) may, as it is said, not be an authority in one sense: but, that it was Lord *Thurlow's* judicial opinion, and would have been his decision, if it had been necessary to decide it, I have no doubt; and I am much misled, if that Learned Lord, who was very apt to give his peculiar attention to legal subjects, and after he had decided upon them, ever altered his opinion under the impression of any contrary opinion or reasons, that he had received.

Suppose this point altogether unprejudiced by decision. There are different sorts of landed property, known to the Law: land in fee-simple; and leasehold property: I am not at present alluding to copyholds.

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| (80) <i>Vere v. Loveden, Jones</i> | 1 <i>Exp. Ni. Pri. Ca.</i> 8. |
| <i>v. Jones</i> , ante, Vol. XII, 179, | (82) <i>Folkingham v. Croft</i> , |
| 186. | 3 <i>Anstr.</i> 700. |
| (81) <i>Morgan v. Slaughter</i> , | (83) 3 <i>Bro. C. C.</i> 632. |

If a man covenants to sell a fee-simple estate, free from all incumbrances, and says no more, it is clear, that covenant carries *in gremio*, and in the bosom of it, the right to proper covenants. Why? Because that sort of engagement has in all time been carried into execution in a form and mode, which alter most materially, substantially, and importantly, the effect of the mere conveyance. If no more is done than the agreement imports, the conveyance contains express covenants: the words operating warranties, and obligations, which it was not understood between the persons contracting that the one was to undertake, and the other to have the benefit of; and accordingly it is perfectly settled by the Law, what are the covenants, as applied to the case of a vendor, who was himself a purchaser for valuable consideration; or who took by descent; or by purchase, but not for valuable consideration; and, though the agreement, if literally executed, would carry all the extensive obligations, to which the legal warranties, flowing from the words, would bind the vendor and his heirs, yet it cannot be carried into execution without express covenants, substituted for, and limiting, the implied covenants. In such a case the Law would determine, according to *Henderson v. Hay*, what are usual covenants (84).

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v.

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Under a general agreement to sell a fee-simple estate, free from incumbrances, the purchaser is entitled to various covenants, according to the nature of the vendor's title.

With

(84) The usual covenants upon the sale of an estate in fee simple are, that the vendor is seised, and has power to convey, in fee; for quiet enjoyment; that the estate is free from incumbrances; and for farther assurance. The vendor, if he was himself a purchaser for valuable consideration, delivering, or covenanting to produce his title-deeds, covenants against his own acts

only: if his title is by descent, by devise, or otherwise as a purchaser not for valuable consideration, he covenants against the acts of the last purchaser; or, at least, of the person, immediately preceding him. See *Loyd v. Griffith*, 3 Atk. 284. *Wakeman v. The Duchess of Rutland*, ante, Vol. III, 233, 504. *Sugden's Vendors & Purch.* 393, &c. 5th edit.

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Power of assignment incident to the estate of a lessee, without the word "Assigns," unless expressly restrained.

Execution of an agreement for a lease with proper covenants: viz. according to the general practice as to such leases; and not contradicting the incidents of the lessee's estate; one of which is the right to have it without restraint, except what is imposed by law; unless an express contract for more.

With regard to leasehold estates, I should lay no stress upon the word "assigns;" if the lease was to be made to the lessee, his executors or administrators: his assigns being included in himself; and the right to assign, unless restrained, being incident to his estate. The letter of the agreement, however, would not in any degree determine the form of the conveyance. The effect of the lease in the warranties and obligations, as arising out of the words of the lessor and lessee "yielding and paying," and under the execution of their agreement by the Court, is perfectly different: the latter including the covenant for quiet enjoyment; and in many other respects the mutual obligations of both with reference to each other being by the express covenants very materially varied. Before the case of *Henderson v. Hay* (85) therefore upon an agreement to grant a lease, with nothing more than "proper covenants," I should have said, they were to be such covenants as were just as well known in such leases as the usual covenants under an agreement to convey an estate; and, though the word "incidental" is not very precise, I conceive Lord *Thurlock's* meaning to have been, that the party had a right to those covenants, that would be inserted in the execution of an agreement for a lease, arising out of the general, well known, practice as to such leases; and not contradicting the incidents of the estate, belonging to a lessee; one of which is the right to have the estate, without restraint, beyond what is imposed upon it by operation of Law; unless there is an express contract for more.

How does the history of the Law, with reference to this subject, stand? There may be a covenant for almost any thing; and this covenant against alienation without licence is as old as *Dumpor's Case* (86): but how does the

the fact, that there was such a covenant in that case, where it was held to be gone by alienation with licence, prove, that this is a usual, general, covenant in a lease? The conclusion is rather the other way; that this is a special and particular covenant. Consider, how this grows. This covenant, which is represented to be usual, would not prevent under-letting. Then is a covenant against under-letting a usual covenant? and is it proved to be so by the authorities, that it is not restrained by the other covenant? Farther, if the landlord has a covenant against both assigning and under-letting, the tenant might by an agreement, neither assigning, nor under-letting, put another person in possession of the premises; and parting with the possession in that manner would not be a breach of those covenants. Is a farther covenant, therefore, not to part with the possession of the premises, to be given, as a usual covenant? That would not have restrained the tenant from parting with a part of the premises: these covenants having been always construed by Courts of Law with the utmost jealousy to prevent the restraint from going beyond the express stipulation. The Court will have to consider, whether all these covenants are also included under the terms "usual and proper covenants," in the construction of an equitable agreement; where the law would regard the instrument with that jealousy.

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Covenant, restraining assignment of a lease, would not prevent under-letting.

Covenants, restraining lessee from alienation without license, construed with jealousy.

Independent therefore of the authorities, I should have said, that the meaning of the parties to a contract for a lease was, that there should be proper covenants; and that the law implies, what they are; as connected with the character and title of the lessor: covenants in this sense incidental; as regulating the obligations expressed and implied; not in contradiction to the quantity of interest, which the demise itself without special words was by the agreement to give to the lessee. The case of

Proper covenants implied in an agreement for a lease, as connected with the character and title of the lessor.

Henderson

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*Henderson v. Hay* (87) in its circumstances shews, what reliance is to be placed upon this word "usual." The assignee of the lease of a public house, which lease contained no covenant, restraining alienation without licence, contracted for a lease, not only of the public house, but of other premises also. It was a case therefore, in which, not only the original lessor had no idea of such a covenant, but it could not relate to the public house only; and it was as fair to argue from the nature of the other premises, which were part of the subject of the demise, as from the nature of the public house. Lord *Thurlow* however conceived, that this agreement to demise such an interest upon common and usual covenants meant only, that an agreement to give an interest for twenty-one years in equity gave it to the party, his executors, administrators, and assigns; and that the covenants were to be such as would not break down the extent of that interest, contracted for.

In the case before Lord *Kenyon* (88) the agreement was for fair and usual covenants: but before the case of *Henderson v. Hay* there is no one instance, that such a covenant as this was conceived to fall within the description of usual covenants. *Dumport's Case* (89) proves no more than the fact, that there was in that instance such a covenant; not, that it is a usual, covenant; and on that account to be inserted in all leases. I am perfectly unable to follow that sort of reasoning. The inference from that case appears to me to be rather the other way. It is said, no lease is properly drawn without this covenant. I have seen many leases without it, and lately scarcely one with it. Such leases as fall within our observation, individually, as lessees, have no such covenant.

They

(87) 3 Bro. C. C. 632.

1 Esp. Ni. Pri. Ca. 8.

(88) *Morgan v. Slaughter*,

(89) 4 Co. 119.

They have a covenant of another sort. A lease is properly drawn with or without such a covenant according to the agreement; and the lessor must shew, that the restraint is to be put upon the powers, which by law flow out of the interest, that he has agreed to give to the other party.

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The case of *Folkingham v. Croft* (90) was upon an agreement for a lease "with all usual and reasonable" covenants commonly inserted in leases of the same "nature." Some construction must be given to those latter words. The explanation with reference to the peculiar property, which was the subject of that demise, is a most dangerous proceeding: but it is stated, as a fact in that case,\* that there was no regular, local, practice upon the subject: it being equally common in such leases to insert or omit the covenant. The Plaintiff therefore failed upon the ground of local usage; and, though I say, that I should not have had much difficulty in deciding that case, if it had come before me without any authorities, I fear, that would have been, because my opinion is directly contrary to that decision.

As this case also cannot be decided upon any usage, locally, I must look to general usage; and, if I could see a usage, with reference to the peculiar subject of this demise, authorising the insertion of this covenant, I might say, the party had contracted for it: but no such fact is made out. Can it be maintained upon a common agreement for a lease, as the meaning of the parties, that the lessee is not to make a sub-demise, to part with the possession; in short, that he is to be subject to all these restraints upon the power of alienation, flowing out of the equitable estate, if nothing is said about it,  
and

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Covenant, that  
a lease shall  
determine  
upon the bank-  
ruptcy of the  
tenant.

and that under the words "usual covenants" all such restraints are to be inserted? With respect to another species of covenant, it is now held, that, to avoid the consequences of bankruptcy a landlord may take a clause, that the lease shall determine upon the bankruptcy of the tenant; and many prudent men take that clause. Is that also to be inserted as a usual and common covenant; and why not, if the fact that such a covenant as this occurred in *Dunpor's Case* (91), makes it a proper and usual one,

I do not go through the reasoning of the *Master of the Rolls* in the two late cases (92). It will be a satisfaction to me to learn from him, how, rather than rest upon that reasoning, which his great mind then suggested, he can bend to that, which appears to me very unsatisfactory in those previous cases. My opinion, that, if decision has not closed this point, the grantor has no right to this covenant, is formed upon grounds, that make me lay out of consideration the small reasoning upon the word "assigns," and the circumstance, that the lessor might at the end of ten years return to his trade in this shop. The safest rule for property is, that a person shall be taken to grant the interest in an estate, which he proposes to convey, or the lease he proposes to make; and that nothing, which flows out of that interest, as an incident, is to be done away by loose expressions, to be construed by facts more loose; that it is upon the party, who has forborne to insert a covenant for his own benefit, to shew his title to it; and that it is safer to require the lessor to protect himself by express stipulation, than for Courts of Equity to hold, that contracting parties shall insert, not restraints, expressed

(91) 4 Co. 110.

v. *Jones*, ante, Vol. XII, 179.(92) *Vere v. Loveden, Jones* 186.

pressed by the contract, or implied by law, but such, more or less in number, as individual conveyancers shall from day to day prescribe, as proper to be imposed upon the lessee; and that, all those restraints, so imposed from time to time, are to be introduced, as the aggregate of the agreement.

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In the case of *Boardman v. Mostyn* (93) the parties compelled the Court to inquire as to the usage in the neighbourhood; to be enforced, not as being usual in the proper sense, but as that, to which it appeared they looked. So, upon many estates the expression is familiar "such covenants as are usual;" as in the leases, granted by the Duke of *Bedford* and Lord *Grosvenor*. The lessee may either desire to be informed, what are the covenants, usually inserted in their leases; or may not inquire about them; concluding, that, being submitted to by the tenants, they are reasonable. In many of those leases it is not thought reasonable, that the restraint of alienation should be during the whole term; but it is only for the last seven years, of a term, perhaps of sixty or seventy years. Whether that should be applied to a term of twenty-one years, is another consideration.

Is it then to depend upon the nature of the property? Is an agreement for the lease of a public house, where nothing more is expressed, to be carried into execution in a different manner from an agreement as to property of another species; with regard to which, though there may not be the same reason, the landlord may have reasons, operating upon him just as powerfully, for requiring the restraint? The proposition would appear extraordinary, as to an agreement for the lease of a public house,

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house, that the tenant was to have a more extensive interest, before a licence was necessary, than he would now be entitled to in the execution of such a contract; that on account of the alteration of the general law in that respect a different decision is to be made upon the same words.

Upon the whole, I came into Court with a firm opinion, that the best, that is, the most legal, decision of this case would be, that the Master is right in rejecting this covenant: but, the case of *Brown v. Raban* having been decided yesterday, an authority of such great weight, I will discuss the subject with the *Master of the Rolls*, before I decide this case. There is a specialty here; that this agreement does specify some covenants, that the lease is to contain; and has no reference to the general expression "usual and proper covenants:" but there is very little difference, whether those words are found in it, or not, with reference to the ground of my opinion; which is, that, where the interest to be demised carries with it the power of alienation, it can be shut out only by express contract; and the proper and usual covenants must be such as would be inserted in a lease, giving the power of alienation for twenty-one years.

The Lord Chancellor.

Aug. 8th.

I have not had an opportunity of consulting the *Master of the Rolls*; who has been out of town: but I understand, that the words "with usual covenants" were relied on in the judgment at the *Rolls*. I am extremely anxious not to give my final judgment upon this case, until I know, what is the value, which the *Master of the Rolls* sets upon that distinction. The principle, upon which
 my

my opinion rests, is, that before the case of *Henderson v. Hay* (94) there was no sort of difference, whether the agreement in the terms of it did or did not refer to usual and proper covenants; that in every agreement, whether as to freehold or leasehold estate, it was implied, that there were to be usual and proper covenants. It will be a great relief to me, if it should appear, that the decision of that case did not rest upon that distinction; of which, after repeated consideration I cannot state the actual value: nor, looking back to the cases, can I state, what is the result of them.

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The Lord CHANCELLOR.

I have examined the *Register's Book* (95) as to the case of *Henderson v. Hay*; with the view to ascertain, whether it is to be considered merely as the opinion, or as the judgment, of Lord *Thurlow*. The cause came on upon the objection to the clause; which was proposed; as it is stated in the report; and it was declared, that the Defendant has not any right to insist upon the clause to restrain the alienation of the premises being inserted in such lease; reserving the consideration of costs. It is therefore a declaration in judgment upon the very point.

Aug. 9th.

I have had sufficient communication with the *Master of the Rolls* for this purpose. The law of this Court is

unques-

(94) 3 Bro. C. C. 632. post, 528, that a Petition of
(95) *Register's Book*, 1791. re-hearing was presented by
A. fol. 337. That case was the Defendant; and the Bill
in the argument considered was afterwards by agree-
as having ended in a com- ment dismissed without costs;
promise from the observa- which appeared by the *Re-*
tion of the *Master of the gister's Book*.
Rolls in *Brown v. Raban*,

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unquestionably, as Lord *Thurlow* there declared it; and I conceived it to have remained undoubted until the case before Lord *Kenyon* (96); which cannot justly be considered merely as a decision; as his Lordship was eminently skilled in the doctrine of this Court; and could not have been ignorant of the case of *Henderson v. Hay*. I therefore say with reluctance, that the reasoning, upon which Lord *Kenyon* determined that case, does not satisfy me, that it is the law. When the point was before the Court of Exchequer (97), it does not appear, that the Court found it easy so to state the law; as they deliberated upon it a considerable time. With respect to that case I can only say, that my mind is not by any means satisfied with the reasoning. I have read the two cases (98) before the *Master of the Rolls*, which are in print; and certainly it would be very difficult to answer the reasoning, that appears in those judgments. I have stated the grounds of my own opinion upon this point; and I understand, the *Master of the Rolls* still considers that the better opinion; but, the case in the Court of Exchequer having been so decided, he thought it difficult to depart from it. With reference to that however it seems to me, that Lord *Thurlow's* authority, in 1791, was not treated with all the respect, that is due to it, in the subsequent period; and the existence of these four cases in controversy, three at the *Rolls*, and this one before me, is decisive evidence, that the point was not set at rest by the case in the Court of Exchequer. The *Master of the Rolls* also agrees with me, that, whether the agreement contained the clause, that usual covenants should be inserted, or not, would not make a material difference; and, with great anxiety to be right upon this point, I never

(96) *Morgan v. Slaughter*, (98) *Vere v. Loveden, Jones*
 1 *Esp. Ni. Pri. Ca.* 8. v. *Jones*, ante, Vol. XII, 179,
 (97) *Folkingham v. Croft*, 186.
 3 *Anstr.* 700.

never will consent, that my opinion shall be supposed to stand upon such a distinction. Before the case of *Henderson v. Hay* an agreement for a lease would have been executed precisely in the same mode, as to the covenants to be inserted, whether that clause had been contained in it, or not: so would an agreement for the conveyance of a real estate. In this case therefore I must act upon my clear opinion of what the Law is; which is, that the lessor is not entitled to such a covenant.

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The Exception was accordingly over-ruled.

POTTS v. LEIGHTON.

1808.
July 30th.
Aug. 11th.

A MOTION was made, that the Receiver of the personal estate of the testator may be discharged, with costs, for not having passed his accounts, and paid in the balances.

Receiver of the personal estate of the Testator, not passing his accounts and paying in the balances, deprived of his salary; and charged with interest, not upon each sum from the time it was received, according to the strict

Sir *S. Romilly*, in support of the Motion: Mr. *Hart*, for the Receiver.

The Lord CHANCELLOR.

There is a General Order (99), of some time standing, that, if a Receiver does not regularly pass his accounts, and

(99) See the Order, at the end of this case, p. 278.

rule, applicable to a Receiver of annual rents and profits, but as an executor would be charged.

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and pay in his balances, he shall not be allowed any salary whatsoever. Why that Order is dispensed with in any case I do not know; and I desire, that it may be enforced in future. There are several instances of Receivers, who, having obtained an Order for maintenance, have done nothing more; not passing any account for twenty years; and the instant the infant attains the age of twenty-one an account is passed with him; and the Court has no information upon the subject. That could not happen, if the Order was enforced. Receivers are under a great mistake in supposing, they are not to pay in their balances, until some person obtains an Order for that purpose. A Receiver may pay in money upon his own application.

The Motion stood over; that the Master might make his Report; by which it appeared, that several sums, amounting to 3500*l.*, had been received in *October* and *December*, 1804; and retained by the Receiver until the end of the year 1806; when he made a payment into the Bank under an Order; which left a balance in his hands of about 1400*l.*; which he afterwards laid out in Exchequer Bills. The Master disallowed his claim of one shilling in the pound, as a salary, and also some special charges for trouble and expense; and submitted, whether interest should not be paid upon each sum from the time it was received.

The Lord Chancellor.

Aug. 11th.

This is a Motion, that a Receiver may be ordered to pay into Court a balance, reported due from him; which is formed by the disallowance of his salary, and of extra charges for particular expenses, claimed by him upon the ground, that he is entitled to those allowances, if entitled to his salary. He was appointed Receiver of the

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the personal estate of the testator; and the personal representative was directed to give him assistance. He received in *October* and *December*, 1804, several sums, amounting to 3500*l.*; and he charges about 229*l.*, as his salary or poundage for the mere act of taking that money into his hands. He kept the whole of that sum until the end of the year 1806; when a payment into the Bank was made by him under an Order: that payment leaving a considerable sum, above 1400*l.*, in his hands; which, it is represented, was at a particular period laid out in Exchequer bills. Charging himself with these considerable sums, he does not allege any payments, except that one in 1806, at the end of two years, and some farther very trifling sums. By the Order, appointing him Receiver, he was directed to pay the money into the Bank from time to time; and the condition of his recognizance is expressed to be for paying the money into the Bank, as before ordered, or afterwards to be directed. This, therefore, is not the case of a Receiver of annual rents and profits: but he is in the situation of an executor, from time to time receiving capital sums, the bulk of the testator's estate. The Master very properly refused to appoint in the first instance any salary or poundage; stating his reason, that he did not think it proper to do so, until he could learn by the Receiver's accounts, what he would be entitled to for his trouble and expence. No account was ever passed: nothing therefore was before the Master until the demand finally made of a shilling in the pound upon the sums received in *October* and *December*, 1804, and the other charges: his only trouble being a motion to pay the money into Court upon his own affidavit; stating, however, great trouble and expence, as constituting his demand from the testator's estate; in respect of which he claims precisely the sum, which is reported as the balance in his hands.

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The Master, acting under a General Order (100), made in 1796, which is, I believe, much out of memory, has disallowed the whole claim of salary or poundage; has also stated his opinion, that special items for trouble and expence ought not to be allowed: and has farther submitted, whether interest should not be paid upon each sum from the time, when it was received; giving credit for the payments. Except in a very few instances of certificates to me from the Masters' Offices that Order seems to have been entirely forgotten. It is impossible in this instance to allow the salary. The mere circumstance, that the Receiver was not called upon by the Solicitor in the cause, whether from culpable negligence or for any reason, is no excuse for not paying into Court the money, which was received: the duty of the Receiver, according to his engagement, requiring him to do so. If he wants an Order, he may have it immediately. A Receiver cannot be permitted to charge 230%, merely for receiving above 3000%; admitted to have been kept in his hands two years, probably at a profit. The Master is therefore right in disallowing that charge.

Distinction between an Executor and a Receiver as to allowances for charges and trouble.

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I have more difficulty upon another part of this case. This is the case of a Receiver, who might have entitled himself to a salary for getting in the personal estate of the testator; and the question with reference to that would have been, whether that salary was to cover all his expenditure and trouble; or, whether upon special circumstances he would be entitled to any special allowance. An executor is allowed many charges and expences; as he has no salary. The Court must take care, that all, * which the Receiver was bound to do for that salary should be done: but, the Master having specially reserved the consideration as to the salary, until he had seen, what trouble

(100) See the Order, at the end of this case, p. 278.

trouble and expence had been incurred, the claim of the salary ought not to exclude him from an allowance in respect of any actual trouble and expenditure, which he can make out. I shall direct a special inquiry, whether he is entitled to any allowance in respect of his trouble, care, and expence.

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As to the demand of interest, interest must be paid upon the sums retained: but I do not remember an instance of laying so heavy a hand upon a Receiver as a charge of interest upon each sum from the moment, at which it came into his hands; and I have a difficulty in applying the charge of interest to this Receiver otherwise than to an executor. This case is not to be compared to the case of a Receiver of rents and profits; who is to pass annual or half-yearly accounts, as they are received: but the Court ought to charge this Receiver, as an Executor; having regard to all the circumstances, as to his actual retention of sums received. I think, therefore, the calculation of interest ought not to be so hard upon him, as the Master proposed (1).

The following is the General Order referred to in this case.

(1) Ante, *Fletcher v. Dodd*, Vol. I, 85, and the note,

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GENERAL ORDER OF COURT.

23d April, 1796.

General Order, that Receivers shall annually pass their Accounts, and pay in their Balances; or lose their Salaries; and be charged with interest at 5 per cent.

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IT appearing from the returns, made by the Masters in Chancery, in pursuance of the Order of Court, dated the 15th day of *December*, 1792, that many Receivers of estates, appointed by this Court, have not been so punctual in passing their accounts, and paying their balances, due thereon, as they ought to have been, THEREFORE IT IS ORDERED, that the several Masters of this Court shall hereafter fix the days, on which all Receivers in their respective offices shall annually procure their accounts to be delivered unto the Masters; and also the days, upon which such Receivers shall pay the balances, appearing due on the accounts, so delivered in; or such part thereof, as the Master shall certify proper to be paid by them; and it is further ordered, that with respect to such Receivers as shall neglect to deliver in their accounts, and pay the balances thereof, at the times, so to be fixed *for that purpose, as aforesaid, the several Masters, to whom such Receivers are accountable, shall, from time to time, when their subsequent accounts are produced, to be examined and passed, not only disallow the salaries, therein claimed by such Receivers, but also charge interest at *5l. per centum per annum* upon the balances, so neglected to be paid by them, during the time the same shall appear to have remained in the hands of such Receivers; and it is further ordered, that every Receiver, acting

acting under the authority of this Court, shall each year procure his annual account of receipts and payments respecting the estate, entrusted to his care, to be examined and settled by the Master, whose duty it may be to inspect the same, within the space of six months next ensuing the time, appointed by such Master for the delivering of such account into his office, as is hereinbefore directed; and, in case any Receiver shall at any time hereafter neglect so to do, a certificate of such default is hereby required from the Master, in whose office such neglect or default shall happen.

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STAMFORD FRIENDLY SOCIETY, *Ex parte*.*Aug. 11th.*

The preference, given to Friendly Societies by the Stat. 33 Geo.

III, c. 54, s. 10, over other creditors, is confined to debts in respect of money in the hands of their Officers by virtue of their offices, and independent of contract: therefore does not extend to money, held by the Treasurer upon the security of his promissory note, payable with interest upon demand.

THIS petition, presented by two of the members of the Friendly Society, on behalf of the Society, under the Act of Parliament (2), prayed, that the assignee of *Hanson*, who had taken the benefit of an Act of Insolvency, may be ordered to pay the sum of 60*l.*, with interest, to the petitioners, in full discharge of his debt to the Society, and in preference to his other creditors, under the following circumstances:

The petition stated, that *Hanson*, who kept a public house, at which the Society assembled, upon the 8th of *October*, 1805, the day of their annual meeting, as the father and treasurer of the Society, had in his hands 30*l.*, belonging to them; and, the Society having some money in the box, 20*l.* was placed in the hands of *Hanson*; who gave as security his promissory note, expressed to be for the sum of 50*l.*, borrowed and received of the Society, which he promised to pay upon demand with 4*l. per cent.* interest. The other sum of 10*l.* was stated to have been placed in his hands under the head of subsistence money. He paid interest upon the sum, secured by the note for two years,

Mr. *Heald*, in support of the petition, referring to the late cases (3) upon this Act of Parliament, contended, that the whole of this sum of 60*l.* was money in the hands

(2) Statute 33 Geo. III. *Ex parte Ashley, Ex parte Corser, Ex parte Ross*, ante, c. 54. s. 10.

(3) *Ex parte The Amicable Society of Lancaster*, Vol. VI, 98, 441, 802. *Ex parte Buckland, Buck*, 214.

hands of *Hanson*, as treasurer of the Society ; and therefore a debt under the Act to be paid in preference to his other creditors ; distinguishing those cases, as the money was not in the possession of the party, as an officer.

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Mr. Hall, for the Assignee.

Of this debt 50*l.* clearly cannot be considered as within this Act of Parliament. That was not in his hands as an officer of the Society ; according to the words of the act money, remaining due, received by virtue of his office : but money lent to him upon security ; with interest at a particular rate : a case, provided for by another clause (4) of the Act. This case falls within the cases, that have been mentioned ; except as to the 10*l.* ; which certainly is under different circumstances.

* *The Lord CHANCELLOR.*

It is not for my consideration, whether this Act of Parliament, which certainly has a very harsh operation upon other creditors, excluding every fair, honest, demand from sharing equally with these societies, was a reasonable provision of the Legislature : but at least those, who claim the preference, must shew their right to it in the mode, prescribed by the Act. The preference is given in respect of money, received by officers of these societies by virtue of their offices : but it never was the intention of the Legislature, that persons, to whom they chose to lend their money, should pay them in preference to other creditors. The preference is given only in respect of money, which got into the hands of officers independent of contract. This petition is entirely silent upon the fact, how far, and for what purpose, the rules * of this Society permitted the treasurer, to receive and keep money ; except the single allegation, that, as father and treasurer of the Society, he had in his hands 30*l.* ;
which

[*282]

1808.

STAMFORD
FRIENDLY
SOCIETY,
Ex parte.

which is an averment, that he had that sum in his hands as treasurer. The whole of this sum of 50*l.* was money in his hands by contract; not upon bond, or any obligation by virtue of his office. As to the 10*l.*, it is probable, that sum, which is stated to have been placed in his hands as subsistence money, did get to him as treasurer. Keeping the public house, where they met, he might have had the money in his hands for that purpose. My opinion is, that the Legislature did not intend, that these Societies should have the very large remedies, given to them by this Act of Parliament, unless the money was dealt with precisely as the Act directs; and, if, instead of resting upon the security, which the Legislature gives them, they lend money to one of their officers upon a special contract between him and them, that is a loan to him; and is not to be considered as money in his hands by virtue of his office within this Act of Parliament. These Societies must understand, that, if they will lend money upon special contract, they have not the remedies, which they suppose they have.

The Order was accordingly made for payment of the sum of 10*l.*; but was refused as to the remainder of the Petition.

WYNNE v. LORD NEWBOROUGH.

1808.

Aug. 16th.

THE object of a petition, presented in this cause, was that the Receiver appointed by the Master, may be removed; and that the petitioner may be appointed Receiver. The objections, made to the gentleman, who was appointed Receiver, were, that he was a practising Barrister, and a Member of Parliament; and the latter character was relied on, as an absolute disqualification. The objection, urged against the petitioner, was the considerable distance of his residence from the estate.

Petition to change a Receiver. The Master's judgment not absolutely conclusive: but the Court interferes with reluctance.

Mr. *Hart*, and Mr. *Roupell*, for the Petitioner: Sir *Arthur Piggott*, for the Trustees; desiring another reference to the Master. Mr. *Richards*, and Sir *Samuel Romilly*, for the Receiver; and Mr. *Fonblanque*, for Parties, who approved the Appointment.

The recommendation of the testator, and the respect due to a considerable family, are to be attended to in the appointment.

The Lord CHANCELLOR.

In the appointment of a Receiver considerable attention is to be given to the recommendation of the testator; also to the respect, due to such a family as this; upon grounds of policy; as connected with the welfare of the public. On the other hand, looking at the directions of this testator as to management, the residence of this petitioner, in *Oxfordshire*, at a distance, between 200 and 300 miles from the estate, which he is to let and manage with the approbation of the Master, forms an objection of great weight; and I take the opportunity

The circumstances of the person proposed (in this instance a relation of the family), a residence, distant from the estate, being in Parliament, to and a practising Barrister

in town, though no absolute disqualification, are to be considerably regarded.

Distinction with reference to such circumstances, between an Auditor, and a Receiver with powers to let and manage, &c.

1808.
 WYNNE
 v.
 Lord
 NEWBO-
 ROUGH.

to observe, that it is singular, that persons should so frequently be appointed Receivers, whose personal attention to the estate cannot be given in the degree, in which it ought. Independent of the circumstance, that the gentleman, who is appointed Receiver is a relation of the family, and will occasionally visit the estate, it cannot be represented, that a Member of Parliament, who is also constantly attending in this Court, is that sort of Receiver, who is to let and manage the estate. His parliamentary and professional character, as connecting him with a fixed residence here, is a circumstance, to which the Master must attend. I am pressed to lay down generally, that a Member of Parliament is absolutely disqualified to be a Receiver. I will state no such doctrine: but I must observe, that I have been considerably startled by frequent sequestrations of late against Members of Parliament for not bringing in their accounts, as Receivers, Guardians, or Committees. The established practice presumes, that a person shall be appointed to these duties, consistently with whose professional life so much time can be spared for the management of the estate as can be easily applied; and, if a probable ground is laid, that the requisite attention cannot be given, though I do not represent it as an absolute disqualification, such circumstances are to be regarded by the Master in the appointment. The Court in its habitual and constant practice, taking the security of other individuals, also calls upon the party proposed to join; and, if the remedies under that security are not such as can be had against other men, that is also a circumstance to be attended to. It is not an insuperable objection, that the sureties are Members of Parliament: but would any man select three Members of Parliament, as sureties to him, in preference to three men, of equal fortune, who were not in Parliament? I do not therefore say, that this gentleman, being a Member of Parliament, cannot be a Receiver; that he may not be the best Receiver,

ceiver, who can under the circumstances be procured; and that circumstances may not preponderate over the grounds, opposing his appointment, from his professional, as well as parliamentary, character. I merely say, these are circumstances, to which the Master, considering, who should be the Receiver, ought to attend; and desire, that the same caution shall be thrown round these cases, that would be applied by a prudent man in his own concerns.

1808.
WYNNE
v.
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ROUGH.

Another circumstance induces me to call upon the Master to review his Report. Lord *Thurlow* said, he should always be reluctant to suppose the Master wrong in his judgment for this obvious reason; that upon all these appointments a discussion and disclosure may take place before the Master, that for the benefit of families should not be repeated in this place. The Master therefore, having had better opportunity for discussion, may be right: but I doubt, whether in this case the parties have not gone into the Master's Office upon the supposition of a contest between these gentlemen, instead of laying before him all the proposals, that might have been carried in. Holding the doctrine of Lord *Thurlow* very high, I do not carry it to the extent, that the Master's judgment is always to stand: but I think, the circumstance, that the Receiver is a practising Barrister here, and a Member of Parliament, deserves great consideration; though I do not say, there may not be circumstances against that, which may preponderate. Upon the whole therefore, not concluding, that this may not at last appear to be the proper result, I think, this case requires farther consideration; and the Master should review his Report. There is a great difference between the appointment of a gentleman of respect and honor, as this gentleman is, practising at this Bar, as Auditor of such an estate as this, and as Receiver (5).

(5) Ante, *Tharpe v. Tharpe*, *Dawkin*, I, 452, and the note, Vol. XII, 317. *Thomas v.* 453.

1808.

Aug. 18th.

Undertaking in writing to guarantee the debt of another sufficient, within the Statute of Frauds; without stating any consideration as between the creditor and the surety.

Partnership bound by the signature of one partner.

Under a guaranty the debt is contingent only: therefore a debt, accrued by default after the Bankruptcy of the surety, cannot be proved under the Commission. (See p. 289, n. (9).)

GARDOM, *Ex parte*.

IN 1807 the Petitioners, being applied to by *Thomas Tapp*, of *Manchester*, to sell to him cotton twist, desired a reference; and were accordingly informed verbally by *Goodwin*, of the house of *Hargreave* and *Goodwin*, that their house would guarantee what twist the petitioners might sell to *Tapp* up to the 1st of *January*, 1808; as *Tapp* was manufacturing goods for them. On the 29th of *September* the petitioners sold to *Tapp* twist to the amount of 31*l.* 7*s.* Afterwards upon a farther application to them they drew up in writing the following engagement, to be signed by *Hargreave* and *Goodwin*:

"We agree and engage to guarantee for what twist
" *Thomas Tapp* may purchase from you from the 28th
" ult. to the 1st of *January*, 1808.

" *Hargreave* and *Goodwin*."

That paper was signed by *Goodwin*. The petitioners continued to sell twist to *Tapp* at different times until the 30th of *December*. Upon his next application they desired another guaranty, which was given in the following form:

"Whatever cotton twist you may dispose of to Mr.
" *Thomas Tapp* we agree and engage to guarantee the
" payment of the same.
" *Manchester*, 15th *Jan.* *Hargreave* and *Goodwin*."

Farther sales were made upon that. All the sales were at a credit of two months, usually reckoned from the first day of the month after the sale: at the end of which

which time payment was to be made by a bill at two months. A Commission of Bankruptcy issued against *Tupp*; and another against *Hargreave* and *Goodwin*, dated the 11th of *February*. Under that Commission the petitioners offered to prove the residue of their demand upon *Tupp*, to the amount of 237*l. 9s.*: but their proof was rejected upon three grounds: First, that the guaranties did not state any consideration, as between the petitioners and *Hargreave* and *Goodwin*: Secondly, that the signature of *Goodwin* alone could not bind the partnership: Thirdly, that the credit, at which the goods were sold, except the first parcel, upon the 29th of *September*, 1807, had not expired until after the date of the Commission against *Hargreave* and *Goodwin*.

1808.
GARDOM,
Ex parte.

The prayer of the petition was, that the petitioners may be admitted to prove.

Mr. *Bell*, in support of the Petition, mentioned *Wain v. Warlters* (6), as a case, that could not be supported.

Sir *Samuel Romilly*, for the Assignees, gave up the second objection: but insisted upon the others; observing as to the case of *Wain v. Warlters*, that it was the unanimous decision of the Court of King's Bench.

The Lord Chancellor.

The objection, that the partnership was not bound by the signature of one partner, is properly given up. The question upon the first objection is of great importance. Until the case of *Wain v. Warlters* was cited some time

(6) 5 *East*, 10. See the note, which support it. As to the general nature of a guaranty see *Sampson v. Barton*, 4 *J. B. Moore*, 515.
Lord Chancellor's opinion against that case, ante, Vol. XIV, 190, *Ex parte Minet*; and the authorities, in the

1808.

GARDOM,
Ex parte.

time ago (7), I had always taken the Law to be clear, that, if a man agreed in writing to pay the debt of another, it was not necessary, that the consideration should appear upon the face of the writing. That case has determined two points: first, that a consideration is necessary: secondly, that it must appear upon the writing. It is excessively difficult to distinguish this from that case; as for this engagement to be answerable for any twist, which the petitioners should apply to another person, there is no consideration; unless as it may be proved by parol evidence, that they did agree to furnish twist. My opinion is, that this is an agreement within the meaning of the Statute (8) to pay for the debt of another person.

Under the guaranty of a Bill of Exchange, expressly as if the surety had indorsed it, the Bill not being due until after his Bankruptcy, no proof: actual indorsement being necessary.

Upon the remaining question, I think, this claim cannot be sustained for the price of those goods, as to which the credit had not expired: being under the word "guarantee" a contingent demand: therefore no debt arising until default made. The distinction has been strongly taken upon bills of exchange. Upon a guaranty of a bill of exchange it has been held, that, if the bill was not due until after the bankruptcy, proof cannot be made; and in one instance that was carried so far, that, where the party had said, he guaranteed the bill, as if he had indorsed it, Lord *Thurlow* held, that, being a mere guaranty, it would not do: there could be no proof without actual indorsement.

The

(7) *Ex parte Minet*, ante, Vol. XIV, 189.

(8) Stat. 29 *Char.* II, c. 3. The 4th section enacts, that no Action shall be brought whereby to charge the Defendant upon any special promise to answer for the debt

of another person, unless the *Agreement*, upon which such Action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith.

The Order declared the partnership of *Hargreave* and *Goodwin* bound by the guaranty; and directed an inquiry by the Commissioners as to the circumstances with respect to each parcel of twist; and what was done, when the credit expired (9):

1808.
GARDOM,
Ex parte.

(9) By statute 6 Geo. IV. or after the contingency has
c. 16. s. 56. contingent debts happened.
may be proved by valuation,

MUMFORD, *Ex parte.*

1808.
Aug. 18th.
Proof in
Bankruptcy
under promi-
sory notes for
liquidated da-
mages by com-
promise of an
action for se-
duction; *per*
quod Servitium
Amisit.
Distinction as
to a security,
Premium Pu-
doris.

THE petitioner brought an action for the seduction of his daughter; which having nearly proceeded to judgment, was compromised: the Defendant giving the Plaintiff three promisory notes: one for 23*l.* for the expences, and the Plaintiff's costs; and two notes for 100*l.*; in satisfaction of the damages. The first was paid: but, before the others were due, the Defendant became a bankrupt; and the Commissioners, having rejected the proof, the petition was presented.

Mr. *Hall*, in support of the Petition, insisted, that any good consideration was sufficient to support the debt in bankruptcy; and it was not necessary, that the estate should have received the benefit.

Mr. *Fonblanque*, for the Assignees.

The consideration must be, not only good, but valuable; and no charge can be thrown upon the estate, in respect of which the estate has not received any benefit. In the case *Ex parte Cottrell* (10), when the

Lord

(10) *Cowp.* 742.

1808.
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 MUMFORD,  
*Ex parte.*

*Lord Chancellor* sent this question to the Court of King's Bench, the consideration was marriage, and the maintenance of the child; in which respect the estate had received benefit. Upon this distinction in *Ex parte Ward* (11) *Lord Camden* held, that a debt upon a bond, given as *Præmium Pudoris*, could not be proved in bankruptcy: yet upon that bond, or a bill of exchange, given as a compensation for the injury, not as the price of a future illicit connection, an action might have been maintained.

*Mr. Hall*, in Reply.

This case falls precisely within *Ex parte Cottrell*: the injury received forming a valuable consideration for the debt, contracted by way of reparation. An action having been brought to recover compensation for the injury, the parties themselves were as competent to assess damages as a jury: their agreement ascertaining the damages; as the verdict would, if the action had proceeded. The distinction in the case *Ex parte Ward* must have been, that the security, being the price either of commencing or continuing the improper connection, would not support an action. In *Lloyd v. Lloyd*, the case of a bond, with a surety, the surety becoming bankrupt, the debt was proved under his Commission: yet his estate had received no benefit: his engagement being perfectly voluntary: but it was sustained by the valuable consideration, consisting in the antecedent debt from the principal.

*The Lord Chancellor.*

In the action, that was brought by this petitioner to recover damages for the loss of his daughter's service  
 it

(11) MSS. before *Lord Camden*, 1768.

it was competent to the Defendant upon that record to confess the damages. The parties assess the damages between themselves; which is an admission by the Defendant, that he owes this sum for the damages; and he agrees to secure it by promisory notes, payable at a future day. If there was any thing fraudulent in the transaction, that would be another view of it: but my opinion is, that the liquidated damages, the amount of the money, due upon these notes, are a good consideration. This is perfectly distinct from the case of a security, given as *Præmium Pudoris*. Upon reading the petition it struck me, that this debt could not be impeached except for fraud.

1808.  
MUMFORD,  
*Ex parte.*

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The Order was made for receiving the proof (12).

(12) See *Bayley on Bills of Exchange*, 289.

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DEGRAVES v. LANE.

ON the 14th of *July* an Order was obtained upon the usual Motion to dismiss the Bill for want of prosecution: three Terms having elapsed without any step taken. Upon a subsequent Motion, to discharge that order for irregularity, in not having given notice of the Motion, the *Lord Chancellor* refused to discharge the Order; which was regularly made: notice of the Motion to dismiss the Bill for want of prosecution not being necessary: but upon the habit, alleged to have prevailed, of giving notice the Plaintiff's Counsel obtained leave to go into the merits by way of a Motion for an Injunction.

1808.  
*Nov. 17th.*  
Order, dismissing a Bill for want of prosecution after three Terms expired without any step taken, obtained upon Motion of course; not requiring notice.

T 2

Sir

1808.  
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 DEGRAVES
 v.
 LANE.

Sir *Samuel Romilly* and Mr. *Horne*, for the Defendant, insisted upon the merits, that there was no grounds for the Injunction; that no reason was given for the delay; and, as to the point of form, urged the great inconvenience from requiring notice of the Motion to dismiss the Bill, just when by the lapse of three Terms without taking any step the Defendant is entitled to the Order; and that it would be most unreasonable to permit the habit of giving notice, arising from mere courtesy, not authorized by any principle, to grow into a rule of practice: this therefore should be a Motion of course.

Mr. *Hart*, for the Plaintiff, admitting, there was no rule, requiring notice of the Motion to dismiss the Bill for want of prosecution, relied upon the universal practice of the Clerks in Court to give notice; concluding, that, if the Court had an assurance, that the Plaintiff was serious, and did not seek to revive the cause merely for delay, he would be permitted to do so; as the only effect of refusing it will be another Bill.

The Lord CHANCELLOR.

Upon the Motion to discharge this Order for irregularity I cannot deny, that I was pressed by the consideration, that arose out of the courtesy, which is represented as universal: but I was obliged to withdraw from that feeling by my conviction, that all this sort of courtesy leads to the destruction of the whole benefit, arising from the rules of the Court. A Judge can look only to the regular practice; and perhaps it is peculiarly incumbent upon this Court to take care not to increase the means of delay; which is already sanctioned at least in a sufficient degree. One of the greatest hardships, attending this jurisdiction, is certainly the length of time the party is obliged to live in this Court before the decision

cision of his cause. Upon general principles therefore I thought myself bound, as this Order was regularly obtained, to consider it so; and to refuse to discharge it.

1808.
DEGRAVES
v.
LANE.

The next consideration is, whether any reasons are now offered, which ought to induce me, not to discharge that Order for irregularity, but in effect to discharge it; and to put the cause in the situation, in which it was before. One reason always is, that a new bill may be filed by the Plaintiff; and therefore the Defendant sustains no injury: but that may be said upon every occasion, where a bill is dismissed for want of prosecution; and the effect would be, that there is no such rule of practice, that a Bill may, if not prosecuted, be dismissed at a certain period. With regard to the merits, there is no evidence before me, that can justify me upon a principle, that will stand the test of general application, in interfering. The Plaintiff therefore must take the chance of a new Bill.

The Motion was refused with costs (13).

(13) See the note, ante, Vol. XIV, 492.

SCARTH, *Ex parte*.

1808.
Feb. 21st, 24th,
25th.
March 22d.

THIS petition was presented by the assignees under a country Commission of Bankruptcy, executed in *Lancashire*; praying, that the Commissioners may be ordered

In Bankrupt-
cy the Assig-
nees, not the
Commission-
ers, are en-

titled to the custody of the proceedings.

Commissioners of Bankruptcy may be ordered to pay costs in respect of conduct out of the course of their duty, as Commissioners.

1808.
 SCARTH,
Ex parte.

ordered to deliver up to the Solicitor for the assignees the proceedings under the Commission; and to pay the costs.

The petition was the consequence of disputes, which had arisen in this bankruptcy, between the assignees, who were appointed under an order, and the Commissioners, relative to the proof of a debt; which was rejected; and it stated, that the assignees applied to the Solicitor, who sued out the Commission, for the proceedings; who refused to deliver them; claiming a lien; and, though told, that he had no lien upon them, persisted in his refusal; and at length gave them up to the Commissioners; who refused to deliver them to the assignees, on the ground, that one of the Commissioners intended to prefer an indictment for perjury against the Solicitor of the assignees; but an inspection of the proceedings was offered. The petition stood over repeatedly: the *Lord Chancellor* expressing much dissatisfaction with the conduct of the Commissioners; who, in disobedience to positive orders, persisted in their refusal to admit the proof, and to produce the proceedings. The Commissioners also, though called upon, refused to make any affidavit. At length the proceedings were produced in Court: and the Commissioners by a certificate to the *Lord Chancellor* endeavoured to justify their conduct; impeaching that of the assignees and their Solicitor.

Sir *Samuel Romilly* and Mr. *Johnson*, in support of the petition, upon the circumstances pressed for costs against the Commissioners; contending, that the *Lord Chancellor* in bankruptcy has jurisdiction to order the Commissioners to pay costs; as well as the Solicitor; though there are also other means of punishment. They said, it was now decided, in *Ex parte Watson* (14), that

(14) 23d March, 1796, 1 *Cooke's Bank. Law*, 5th edit. 105; 8th edit. 124.

the Commissioners are not entitled to keep the proceedings; and that it was absolutely necessary, that the assignees should have the possession of them; to enable them to proceed under the Commission.

1808.
SCARTH,
Ex parte.

Mr. *Fonblanque* and Mr. *William Agar*, for the Commissioners: (giving up the question as to the possession of the proceedings) as to the costs, observed, that the *Lord Chancellor* would not deal with Commissioners in Bankruptcy precisely in the same manner as with solicitors: the former being his Lordship's own officers, charged with judicial duties; in the exercise of which if they miscarry, it will be attributed to error; and, if any other motive appears, the proper course is to remove them from the trust, in which they were placed. The error of the Commissioners in this instance, conceiving themselves entitled to retain the proceedings, is excused by the general understanding, without any qualification until lately, that the depositions in bankruptcy are not of a public nature; but are taken by the Commissioners only for their own defence; and on that account even a copy would not be granted. The qualification upon that appears only in Mr. *Cooke's* last edition; referring to the case *Ex parte Watson*. There is no instance of giving costs against Commissioners, who had fallen into an error of judgment. In *Johnson's Case* (15) he was compelled to pay costs, not as Commissioner, but as having acted also as banker. These Commissioners were acting in that character only: though one of them had in view farther what he conceived to be an object of public justice; and the possession of the depositions was material for their defence against this Petition.

The

(15) *Ex parte Edwards*, charged with Costs, see *Ex ante*, Vol. VI, 3. That *Com- parte Scarth*, XIV, 204.
missioners, generally, are not

1808.

SCARTH,
*Ex parte.**The Lord CHANCELLOR.*

The question, whether the Commissioners are entitled to have the custody of the proceedings, has been determined a considerable time. The case *Ex parte Watson*, in 1796, is a direct decision upon it. In the case of *Mr. Johnson*, a very honorable man, I made him pay the costs, as what he had done was not in the line of his duty as a Commissioner; and, if Commissioners, admitting, that they knew, that by law they were not entitled to keep the proceedings, and notwithstanding all the inconvenience, should persist in withholding them for the purpose of a prosecution, to be commenced six months afterwards, it would be difficult to represent, that they were so acting in the course of their duty, as Commissioners.

Feb. 25th.
March 22d.

The Lord CHANCELLOR adjourned the question of costs; for the purpose of giving the Commissioners an opportunity for consideration; intimating, that he might be compelled to take a step with respect to future (16) Commissions,

(16) *Mr. Christian* (2 *Chr. Bank. Law*, 221), suggests an easy remedy in such a case, by a renewed Commission. *The Lord Chancellor* however gives no intimation in favour of that course; and it seems questionable. The Statute 5 *Geo. II. c. 32. s. 44*, after declaring, that no Commission shall abate by the death of the King, proceeded thus: "and if it shall be necessary to renew any such Commission by reason of the death of the Commissioners, named in such

" Commission, so that a sufficient number of Commissioners shall not be living, who can act therein, or for any other cause, in every such case such Commission shall be renewed." Is not the true construction of this clause, that the Commission shall be renewed in every such case of necessity, as that particularly specified; where, for instance, one of three surviving Commissioners is a lunatic, or resident abroad, or refuses to act; so that there is not a sufficient number,

Commissions, in which he should feel great reluctance; and, being afterwards informed, that the prosecution was persisted in, and the Bill found, said, the issuing of all Commissions to these Commissioners should be suspended until the event of the indictment: but upon the submission of the Commissioners, a compromise taking place with the assignees and the solicitor, his Lordship expressed his satisfaction at not finding it necessary to make any Order.

1808.
SCARTH,
Ex parte.

ber, who can or will act? This special direction, with the particular instance of a case of absolute necessity, must have some effect; and the words "any other cause" are restrained by the context; and cannot be understood in their unlimited sense, as importing an absolute discretion.

6 Geo. IV, c. 16, s. 26, passed since the above observations were written, provides shortly and generally, that "if by reason of the death of Commissioners, or for any other cause, it become necessary," any Commission may be renewed: still importing, though not, as the repealed Act, particularly specifying, a case of necessity.

The General Bankrupt Act,

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1808.

July 14th, 15th,
26th.

WARD *v.* HEPPLER. .

A MOTION was made, that the former agent in town for the Defendants may be ordered to deliver to the Defendants or their present agent all deeds, papers, &c. in his custody, belonging to the Defendants, on payment only of what if any thing, shall be found due from the present Solicitor in the country, to him, as agent in the cause.

Lien of the agent in town upon the papers in his hands for what was due to him, as agent in the cause, from the Solicitor in the country.

The late agent in the cause claimed a lien upon the papers, not only for what was due to him from the present Solicitor, which was admitted to be trifling, but also for

1808.
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 WARD  
 v.  
 HEPPLE.

for what was due to him, as agent in the cause, by the former Solicitor; amounting to 232*l.*; for which and other debts he was a prisoner in *Dover* gaol: the Defendants insisting, that he had been over paid; having received from them 65*l.*; the agent opposing to that allegation the length of the pleadings, and the nature of the cause; in the course of which one of the Defendants came to town: and transacted business personally with him.

Mr. *Hart* and Mr. *Horne*, in support of the Motion, contended, that the agent in town has no lien upon the papers; as there is no confidence between him and the suitor. They said, there was nothing in print, relative to this point, except the case of *Farewell v. Coker* (17), and what was said by the Lord Chancellor in *Barker v. Dacie* (18), that the Clerk in Court was the proper officer of the Court; and the Solicitor a new character introduced.

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Sir *Samuel Romilly* and Mr. *Bell*, for the Agent, insisted upon the lien; and put the case of a Bill dismissed by the agent's negligence in not instructing Counsel; who would be liable to an action by the suitor.

The Lord CHANCELLOR said, he thought this point had been determined in this Court; and by analogous cases at Law; and apprehended, that the lien could not be maintained: the agent being considered as paying the Clerk in Court upon the credit of the Solicitor in the country.

The *Register* was directed to search for precedents; and an Order was made, that, the Defendants undertaking to pay the late Solicitor in the cause in the country

what

(17) 2 *P. Will.* 460.

(18) *Ante*, Vol. VI, 681;  
 see 687.

what should appear to be due upon taxation he should deliver his bill; and the agent in town should be at liberty to deliver his bill to the Defendants, as agent for that Solicitor in all business, done by him, for the Defendants, as Solicitor in this cause, or otherwise: the Defendants undertaking to pay the agent what shall appear to be due to him after deducting what they have paid to the Solicitor. The Master was directed to tax such bills; to take an account of the money advanced; and to ascertain the balance, if any due to the agent. It was declared, that the agent in town has a lien upon the deeds, papers, &c. in his hands, for such balance, due to him from the late Solicitor in the country (19); and the Defendants were ordered not to pay the balance, or any part thereof, if found due from them, to him without the consent, of the agent. The Defendants were ordered, pursuant to such their submission, to pay to the agent what should appear to be due to him, after deducting what they have paid to the late Solicitor in the country; and to pay to that Solicitor what shall appear to be due to him, after the payments, already made to him, and the payments, \* which they shall make to the agent in town in pursuance of this Order; and thereupon the late Solicitor in the country was ordered to deliver to the Defendants all the deeds, papers, &c. in his custody, belonging to them; and, the Defendants undertaking to re-deliver the deeds, papers, &c. now in the custody of the agent in town, in case the Court shall at any time order them so to do, that agent was ordered to deliver all such deeds, papers, &c. to the Defendants; and liberty was given to him to apply to have them re-delivered to them (20).

1808.  
WARD  
v.  
HEPPLER.

[ \* 299 ]

(19) Post, *Ex parte Steele*, Solicitor to tax it see *Beames* Vol. XVI, 161, 4, *Bray v. on Costs*, 304, &c.

*Hine*, 6 Pri. 203: but the Client cannot tax the Agent's bill: *Wildbore v. Bryan*, 8 Pri. 677: as to the right of the (20) See as to the lien generally, post, *Ex parte Sterling*, Vol. XVI, 258, and the note, 259.

1808.

Nov. 6th, 17th,  
21st.

## PALMER v. LORD AYLESBURY.

Witnesses  
having been  
examined *de*  
*bene esse*, with  
the view to a  
trial at law,  
the examina-  
tion of another  
witness is not  
permitted  
without strong  
circumstances;  
as, upon a se-  
cond Ejectment  
brought after  
verdict for the Defendant the examination of a witness, produced  
at the trial, who had not been examined under a Bill to perpetuate  
testimony, was permitted; not as to other witnesses.

AN Issue had been directed in this cause, and an Order was made (21), that the depositions of the Plaintiff's witnesses may be read at the trial, in case such witnesses or either of them shall be then dead, or proved to be in such a state of health as not to be capable of attending.

Sir Samuel Romilly and Mr. Hart, for the Plaintiff, moved on the first day of *Michaelmas* Term before the Lord Chancellor and the Master of the Rolls, that the trial should be postponed; and that the Plaintiff should be at liberty to examine a witness *de bene esse*.

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Nov. 17th.

*The Lord* CHANCELLOR.

I have found this case in the *Register's* Book. A Bill to perpetuate testimony was filed by the Defendant in an ejectment; who, after it had been carried down by the Plaintiff at Law three or four times, without going to trial, at length obtained a verdict. Another ejectment being afterwards brought against her, she made an application for liberty to examine a witness, who had not been examined in the cause in this Court; but was examined upon the trial. The objection was taken, that she might have examined that witness here before: but Sir Thomas Clarke permitted that examination. His  
reason

(21) Ante, 176. *Corbett v. Corbett*, 1 Ves. & Bea. 21, 334.

reason must have been, that the Plaintiff, filing a Bill to perpetuate testimony, meaning to use it as a defence against an ejectment, if the witnesses could not be produced at the trial, was not bound to examine all the world; and that person having been examined at the trial, and another ejectment being brought, another Bill to perpetuate testimony might be filed; and, to prevent that circuitry, the examination of that witness was allowed. I collect, that the *Master of the Rolls* must have gone upon the fact, that the witness had been produced at the trial, from this circumstance; that the application was to examine that witness, and others; those others not being stated to have been examined at the trial; and the Order was confined to that witness, who had been examined at the trial; and was not granted as to the others.

1808.  
PALMER  
v.  
Lord  
AYLESBURY.




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*The Lord CHANCELLOR.*

I have received a communication from the *Master of the Rolls* upon the question in this cause upon the application to examine a witness *de bene esse*; and the opinion of us both is, that this is a Motion, which cannot be made with effect without laying before the Court very strong circumstances to induce the Court to permit the examination; and, without saying, that it cannot be granted in any case, we do not think it can in this.

Nov. 21st.

[ \*301 ]

## IN THE COURT OF EXCHEQUER.

Lord Chief Baron MACDONALD.

Barons { THOMPSON,  
GRAHAM,  
WOOD.

1808.

Nov. 17th.

Interest upon a legacy to a wife or a natural child not allowed from Testator's death; as it is in favor of a legitimate child by way of maintenance.

LOWNDES v. LOWNDES (22).

**WILLIAM LOWNDES** by his Will, dated the 3d May, 1805, gave and bequeathed to trustees the sum of 20,000*l.* sterling; upon trust to lay it out with consent of his wife and daughter at interest in Government or real securities, and from time to time during the life of *Elizabeth* his wife, and when and as and after the interest, dividends, or annual produce, of the said trust monies should become due and payable, to pay to the said *Elizabeth* his wife; and from and after the death of *Elizabeth* his wife, in trust from time to time, after the same interest, dividends, and annual produce, should become due, to pay to his daughter for life; with a power of appointment to his daughter. After disposing of the 20,000*l.* \* in several events which never occurred, the Will proceeded thus:

[ \* 302 ]

" I give and bequeath to my said daughter *Elizabeth Lowndes* and to *Thomas Lowndes*, their executors &c.  
" the sum of 3000*l.* sterling upon trust that they the  
" said *Elizabeth Lowndes* and *Thomas Lowndes* and the  
" survivor shall lay out and invest the same at interest  
" in Government or real security and shall from time  
" to

(22) *Ex relatione.*

" to time during the natural life of *William Hook* and  
 " when or after the dividends interest or yearly income  
 " of the said last-mentioned monies should become due  
 " and payable pay the same dividends interest and in-  
 " come into the proper hands of the said *William Hook*  
 " for his support and maintenance so and in such man-  
 " ner, that he may not effectually anticipate assign charge  
 " or incumber the growing payments thereof."

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 ~~~~~  
 LOWNDES
 v.
 LOWNDES.

After the death of *William Hook* the testator be-
 queathed the stock upon other trusts; subject to a power
 of appointment to *William Hook* amongst his children.
 The testator also bequeathed in the same terms two
 other sums of 3000*l.* each to two other children of the
 name of *Hook*. The three legatees of that name were
 his natural children; and were infants at the time of his
 death. He also gave some small annuities: the first
 payment to begin and be made at the end of three ca-
 lendar months next after his decease.

The testator died on the 5th of *December*, 1806;
 leaving his wife *Elizabeth Lowndes* and his daughter
Elizabeth Lowndes surviving.

Elizabeth Lowndes, the widow, died in *February*,
 1807, intestate; and *Elizabeth Lowndes*, the daughter,
 was her administratrix.

It did not appear in the cause, that *Elizabeth Lowndes*
 the widow, had any other provision than that arising
 from the 20,000*l.*, bequeathed to her by the Will; and
 the infants, the *Hooks*, were wholly unprovided for ex-
 cept by the Will.

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The only questions discussed were, whether the widow
 was entitled to interest upon the 20,000*l.* from the death
 of

1808.
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 LOWNDES  
 v.  
 LOWNDES.

of the testator; and whether the *Hooks*, the infant natural children of the testator, were also entitled to interest from the death upon their legacies.

The widow lived only two months after the testator: but it was insisted, that, if interest on the 20,000*l.* began to run from the death of the testator in favour of the widow, it would continue in favour of the daughter, the next taker for life, notwithstanding she had other provisions under the Will.

The cases cited were *Beckford v. Tobin* (23). *Cricket v. Dolby* (24). *Gibson v. Bott* (25), and *Spurway v. Glyn* (26).

At the hearing the Court inclined against giving interest from the death of the testator in either case; and Baron *Thompson* observed, that in the latter part of the Will the testator gives some annuities; and directs, that the payment shall begin at the end of three months from the death; and observed farther, that, to support the claim of interest upon the 20,000*l.*, it must be argued, that the daughter *Elizabeth Lowndes*, who was adult, would be immediately entitled to interest from the death \* of the testator, if *Elizabeth Lowndes*, the mother, had died in the testator's life.

[ \* 304 ]

Nov. 17th.

The LORD CHIEF BARON delivered the opinion of the Court.

We have taken this case into consideration not so much from any difficulty we entertained upon it as out of respect

(23) 1 *Ves.* 308.

(24) *Ante*, Vol. III, 10.

(25) *Ante*, Vol. VII, 89.

(26) *Ante*, Vol. IX, 483.

respect to the opinion of Lord *Alvanley* (27) in *Cricket v. Dolby*. The point, raised as to the 20,000*l.*, is, whether interest is to be given to the wife immediately from the death of the testator. In respect to a child, it is clear, interest should be given from the death of the testator: not so much from the near connection with him as from the imbecility of the child. The Law cannot make nice distinctions as to the ages of infants; and considers all under twenty-one as equally incapable of providing for themselves. Very different is the case of the wife. Lord *Alvanley* threw out an opinion in favour of the wife; but in the very same sentence said, he knew of no case so decided. In the absence of any authority to support us in giving interest to the wife from the death of the testator our opinion is, that we are not authorized to decree it.

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v.  
LOWNDES.

With respect to the natural children, it is clear, that by Law they are strangers to the testator. In *Beckford v. Tobin* Lord *Hardwicke* conceived, that the testator by directing maintenance out of the interest intended, that interest should be given from the death. But in this case there is no scintilla of intention to be collected from the Will; as there was there from the Codicil.

It is plain, that the particular words, used in this bequest, were to mark his intention, that the fund should not be alienated.

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Upon the whole therefore we are of opinion, that neither the widow nor the daughter are entitled to interest on the 20,000*l.* from the testator's death; and also, that the natural children are not entitled to interest from his death.

(27) Ante, Vol. III, 12, 16; see the notes.

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U



## KIRKBY RAVENSWORTH HOSPITAL,

1808.

*Ex parte.*

Nov. 23d, 24th.

No general appointment of Visitor, excluding a Commission of Charitable Uses under the Statute 43 *Eliz.* c. 4, from special powers, that would fall within the general visitatorial power; as powers to the Ordinary to interpret and determine [\*306] doubts upon the Statutes; of amotion and punishment, and of appointment, to the Ordinary, and to the Dean and Chapter of *York*, in certain cases, &c. the whole visitatorial power,

particularly as to the administration of the landed property, not being intended to be given to the Ordinary, as Visitor.

Objection to the Decree under a Commission of Charitable Uses, as having issued in a case not warranted by the statute 43 *Eliz.* c. 4. may be in the form of Exceptions.

UNDER the authority of Letters Patent, dated the 2d and 3d of *Philip and Mary*, *Kirkby Ravensworth* Hospital was founded in 1556 by *Dr. Dakyn*, Rector of the Parish. The Statutes, made by the founder, after directing the mode of electing the wardens, every second year, and specifying their duties, and the compensation they should receive, besides their necessary expences, provided (28), that if in making up their accounts any doubt or any other thing hurtful to the said alms-house or hospital shall arise which cannot be decided and ended by the care and discretion of the two wardens, rector, vicar, or curate, and school-master, then the new wardens shall within forty days next ensuing lay this matter before the Ordinary of the place; and shall take care, \*that the old wardens shall answer before the said Ordinary concerning their doings, "*juxta Formulam Ecclesie; quia Contingit de Religione Domi.*" The election of a school-master was appointed (29) to be by the two wardens, and the rector, vicar, or curate, and two churchwardens, of the parish, or the major part of them; and it was provided, that, if they neglect to substitute a master within sixty days after the death, privation, or promotion, of the former master, then the substitution of the said master, if made within thirty days after notice to them, shall pertain to the Dean and Chapter of *York*; and,

(28) Ch. 5.

(29) Ch. 6.

and, if they omit, &c. the appointment for that turn only shall devolve to the Bishop of *Chester*; or, if the See be vacant, to the Dean and Chapter.

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*Ex parte.*

It was farther provided (30), that, if the master be addicted to gaming or drinking, or be disgraced by any other crime, that shall stand in need of Ecclesiastical Correction, this shall be punished by the Ordinary of the place according to the rules and canons of the Ecclesiastical Law; by whom also, if the crime require it, the master shall be removed from his office: also (31), that if the money, (5*l.* directed to be kept in a chest in the parish church for the use of the alms-house, and lent only upon good security for repayment within six months) be taken out by rapine, &c. the wardens and school-master shall so long be deprived of their salaries by the Ordinary of the place, until the money be restored; and in such case there shall be a power in the Ordinary to sequester the profits; and to make inquiry concerning the premises, when he pleases.

The provision (32) as to the interpretation of the Statutes was thus expressed:

“ Also I will ordain and appoint that if any doubt shall  
“ arise concerning the meaning of the Statutes already  
“ published or shall hereafter be set forth by me or any  
“ thereto lawfully authorized that doubt of whatsoever  
“ nature shall be interpreted altered or made new by me  
“ *John Dakyn* if I please to have it so while I live: but  
“ if any doubt shall happen when I am dead I will that  
“ it be determined and interpreted by the Ordinary of  
“ the place with as much regard to the grammatical sense  
“ as may be.”

[ 307 ]

The

(30) Ch. 11.

(31) Ch. 31.

(32) Ch. 35.

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 KIRKBY RA-  
 VENS WORTH  
 HOSPITAL,  
*Ex parte.*

The next chapter (83) declared, that, if at any time the wardens, school-master, or poor people, of the hospital, or any of them, shall sell, mortgage, or any other way alienate, any of the lands, &c. pertaining to it, otherwise than by leasing for years at the wonted rent, at least, or shall permit any of the lands or other premises to be unjustly usurped, &c. and shall not resist the usurpers, &c. to the utmost of their power, and if after such an attempt the master, wardens, and poor people do not bring, and effectually prosecute, an action at law against the usurpers within half a year, he (the founder) willed, ordained and appointed, that the Dean and Chapter of York shall have power and authority to expel and remove as they like the two wardens and school-master or any of them alienating or consenting to the alienation, &c. and to appoint others, &c. who will claim and regain the lands usurped, &c. ; and apply and restore the same to the hospital, and reform the neglects, &c. and preserve the hospital in its primitive state and condition as much as in their power, answerable to the Statutes of the founder and of all and every the benefactors ; and that the said Dean and Chapter shall have thirty shillings yearly for their concern of the premises : viz. ten shillings out of the stipend of the two wardens, and twenty shillings out of the master's \* salary ; until the hospital be restored to its pristine state ; to cease, when this shall be effected.

[ \*308 ]

A Motion was made, that a Commission of charitable uses should be quashed ; as having issued improperly, in this case ; not being warranted by the Statute (34). The *Lord Chancellor* directed a case to be made for the opinion of the Court of King's Bench upon the question, whether there were a visitor, governor, or overseer, or visitors,

(33) Ch. 36.

(34) Stat. 43 Eliz. c. 4.

visitors, governors, or overseers, of the hospital, appointed within the meaning of the Statute 43 *Eliz. c. 4.*

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VENSWORTH  
HOSPITAL,  
*Ex parte.*

The certificate of the Court of King's Bench (35) stated their opinion, that there are not any visitor, governor, or overseer, or visitors, governors, or overseers, of the said hospital, appointed within the intent and meaning of the Act 43 *Eliz. c. 4.* so as to exclude the application of the powers, granted by that Act.

Exceptions were then taken to the Decree of the Commissioners, upon the ground, that they had acted without authority. Early in the argument an objection was taken to the form of proceeding, by Exceptions, instead of by Motion; in which objection the *Lord Chancellor* at first concurred; but, considering the Motion to quash the Commission as still depending, permitted the argument to proceed; and afterwards held, that the Exceptions were not irregular.

Mr. *Richards* and Mr. *Bell*, in support of the Exceptions.

There is a sufficient appointment of visitor of this hospital, that does not admit the application of the powers, \* given by the Act of Parliament (36). No objection to the appointment of visitor arises from the appointment of particular persons to transact some part of the concerns of the institution. Thus the reference of the particular duty of removing the wardens and school-masters to the Dean and Chapter of *York* does not exclude the appointment of a general visitor; who, though he is not to interfere in that particular duty, is the visitor; if intended by the founder to fill that station. To constitute a visitor

[ \*309 ]

(35) The case of *Kirkby Ravensworth Hospital*, 8 *East*, 221.

(36) Stat. 43 *Eliz. c. 4.*

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*Ex parte*

a visitor no form of words, no legal phrase, is necessary. The appointment depends entirely upon the intention of the founder. The 35th Chapter, declaring, that, if any doubt shall arise concerning the meaning of the Statutes, it shall be determined and interpreted by the Ordinary, is decisive. The interpretation of the Statutes, which is there expressly given is a very high act of visitatorial power; carrying with it, as a consequence, the power of enforcing them.

In the case of *The Attorney General v. Talbot* (37) Lord *Hardwicke* held, that no particular or technical words are required to create a visitor; if that intention appears; which is to be collected from the whole instrument; that the *Lord Chancellor* was general visitor by the direction, that *omnes Socios & singulos Domus prædictæ annis singulis, si opus fuerit, poterit Visitare; &, si quid inter eos repererit corrigendum, illud cum assensu, &c. corrigat & puniat*. His Lordship also relies on the power to constitute the Statute. The same general doctrine is laid down by Lord *Mansfield*, then Solicitor-General, and afterwards from the Bench, in *St. John's College v. Todington* (38); and again by Lord *Hardwicke* in *The Attorney-General v. Middleton* (39).

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The words in this case are most appropriate to express the visitatorial power. Any doubt is not only to be interpreted, but also to be determined, by the Ordinary. The Commissioners have exceeded their power; which did not extend to making Statutes, against the express intention of the founder, that his Statutes, unless changed by him, should not be changed, violated, or broken; reserving to himself the power of making, altering, and inter-

(37) 3 *Atk.* 662. 1 *Ves.* 78.

(39) 2 *Ves.* 327.

(38) 1 *Bur.* 158; see 200, 201.

interpreting; and giving the power of interpreting and determining doubts after his decease to the ordinary. The case of *The Poor of Chelmsford v. Mildmay* (40) is an authority, that the Act of Parliament applies only where the visitor has no interest: but where the estate is in the visitor himself, as trustee, application must be made either to this Court or the Legislature.

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*Ex parte.*

Sir *Samuel Romilly* and Mr. *Ainslie*, in support of the Decree of the Commissioners.

This question has been decided by the Court of King's Bench; and probably was not considered a case of difficulty; as no reasons are given by the Court in support of the certificate. The only question for consideration now is, whether these Commissioners had any authority: whether this Court could give them any: whether the Commission is not a mere nullity: that depending upon the point, whether there is a visitor, not for any purpose, but within that clause of the Statute (41), that gave the jurisdiction to grant a Commission of Charitable Uses. The construction upon that Statute has been invariably, that if there is a visitor, such that this Court could not entertain an Information, there is no jurisdiction to grant a Commission: if there is no such visitor, and therefore an Information might be maintained, the Commission may be granted. It has been decided, and, though certainly a strong decision, is considered by *Duke* (42) as the established law, that, though there is a visitor, if he abuses his authority, in which case this Court will entertain jurisdiction, yet the Court will grant a Commission of Charitable Uses. That very strong case shews the construction, that has been put upon this Act of Parliament; that

[ \*311 ]

(40) *Duke's Char. Uses*, 83. *Mayor and Corporation of*

(41) Stat. 43 Eliz. c. 4. *Morpeth, Duke's Char. Uses*,

(42) *Duke's Char. Uses*, 60.

124, pl. 27. *Hynshaw v. The*

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that this Court should delegate to the Commissioners all its authority; and that they might do all, that the Court could do under an Information. The case of *The Poor of Chelmsford v. Mildmay* was determined in the most tumultuous time of the Commonwealth, the year 1649; and is not considered as law by *Duke*; being against all the other cases. If there is clearly a visitor, this Court can no more act, than it could after having delegated to Commissioners under the Statute all its authority.

The question is then, whether there is a general visitor. The authorities, that no precise form of words is necessary for the appointment of a visitor, are admitted. If the founder shews his intention, that a certain individual; or a constituted body, or corporation sole, shall exercise all those powers, which a visitor would have, that has the effect of an appointment. In the case of *The Attorney General v. Talbot* (43) the founder had enumerated all the duties of a visitor: the *Chancellor* was expressly to visit every year: he was to interpret the Statutes; and to correct, where correction was proper. A visitor is the Legislator and the Judge: a Judge, not for the single purpose of interpreting laws, but also for the application of laws, that are perfectly clear: requiring no interpretation; and, farther, for the interpretations of questions of fact; involving no interpretation of laws. It is within his province, as a judge of fact as well as law, to ascertain the fact; and, if necessary, to call a Jury for that purpose. The duties, imposed upon Commissioners under the Statute (44), are the same; and cannot justly be represented as inconsistent with the directions of this founder. The word "*terminari*" imports, not a judicial act, but, that the ordinary shall be the legislator of the College

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(43) 3 *Atk.* 662.

(44) Stat. 43 *Eliz.* c. 4.

College for this purpose: viz. to make explanatory Statutes for this College: if a doubt exists, he is to declare, what shall be the explanation of that existing doubt. If the mere power of interpreting the Statutes is equivalent to the appointment of general visitor, no doubt could have been entertained in *The Attorney General v. Talbot*, with the addition of a particular enumeration of all the duties of a visitor. This founder, giving special power to do what would fall within the general power of visitor, cannot be understood by these general words to give that power. How is the power of enforcing Statutes incident to that of interpreting them? The power of enforcing laws is not incident even to that of making them. In most governments those powers are kept distinct; and theoretical writers have considered it absolutely necessary, that they should be distinct. The power of amotion, which in one instance is given to the Ordinary, and in another to the Dean and Chapter of *York*, certainly is not implied from the power of interpreting the Statutes.

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Mr. Richards, in Reply.

The question is, not whether some portion of the visitatorial power is vested in certain individuals, but, whether upon the whole the general power of visitor is not in the Ordinary; which may be consistent with the existence of those partial powers. So, the power of amotion, given to the Ordinary in a particular case, will not exclude his general power. No power, properly belonging to the character of Visitor, is more extensive than that of interpretation of laws. The power of making laws is not his province. His office is judicial, to interpret, not to make laws. The absurd intention cannot be supposed, that the ordinary was to have a mere right to interpret; but his construction can have no effect; and that it must go from him to Commissioners or the Court

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*Ex parte.*

Court of Chancery, each perhaps making a different construction, against the express directions of the founder; whose will is the law upon this subject.

*The Lord CHANCELLOR.*

So long ago as the year 1719 this Charity was considered the proper subject of a Commission of Charitable Uses. It does not appear, that any objection was made: but that fact at least shews, that this doubt was not entertained at that time. In consequence of the doubt having been carried pretty high in argument I asked the opinion of the Court of King's Bench; and I have received their unanimous opinion. It is not always their course; though sometimes they do, very usefully, state their reasons. The question has been again argued; and the judgment of this Court is asked. It is perfectly clear, that the opinion of the Court of King's Bench does not necessarily decide the judgment of this Court. I have formed an opinion: but it is impossible at this moment to give the reasons; and it is quite unfit, with reference to the respect due to the other Court, and to the argument, to give my judgment without my reasons.

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*The Lord CHANCELLOR.*

Upon looking into the Statute it appears to me, that these Exceptions, which are in substance, that the Commissioners had no authority to act, might, according to the true intent and meaning of the Statute, and the practice, that has prevailed, be taken. The Commission issues upon the faith, that there is a case, in which it ought to issue; and the remedy is by complaint to the *Lord Chancellor*; which among other forms comes on by Exceptions; and in some cases in *Duke* (45), one upon the

(45) *Duke's Char. Uses*, 34 to 50.

the allegation, that the Commissioners had not authority to act in the case, in which they were acting, it was permitted to come on in that form. It was rather to be taken as a species of complaint than as strictly Exception.

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*Es parte,*

There are cases in *Duke*, which seem to be authorities for extending this Act to cases, where the governors or visitors are themselves trustees; or are making a fraudulent use of such powers as they have as visitors or governors: yet it is clear, that in such cases the Court of Chancery has jurisdiction by way of information. But the question before me is, whether there is a special visitor, in this sense; that he has the general power, as visitor, over the property; or with power merely to interpret; but without the power so to govern and direct the management of the property as to oust the jurisdiction by a Commission under the Statute. The first consideration upon that is, that a Commission actually issued in 1719; and the Court at that time acted upon the case, as one, in which it was fit that a Commission should issue. From that time the Charity has been administered by regulations under that Commission: a \* strong practical exposition of the Statute; as it applies to this hospital.

Authorities for extending the Act 43 Eliz. c. 4. to cases, where the Governors or Visitors are the trustees, or are abusing their powers; though an Information would lie.

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The objection being taken, that this clause of the Statutes prevented a Commission, a case was directed to the Court of King's Bench; who have returned a certificate, that there is no such visitor appointed, as within the true meaning of the clause is a visitor, whose jurisdiction would exclude a Commission. They have not said, there is no visitor. They could not have said that; as I can conceive cases, in which the power to interpret and determine doubts upon the Statutes, given in clear words,

Power, clearly given, to interpret and determine doubts

upon the Statutes, may itself constitute visitatorial power.

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may itself constitute visitatorial power. But the question is, whether, taking the whole of the Statutes together, the person pointed out would have the general visitatorial power; or would be entitled upon the whole to have so much as belongs to the exercise of it according to the plain interpretation of the terms, in which that visitatorial power is given: the founder meaning either to withhold all other visitatorial power, or to devolve the rest entirely, or in part, upon other persons.

Many other parts of these Statutes require attention; and the true result of the whole is, that the ordinary is not entitled, as visitor, to have the power, management, controul, and direction, of the administration of the landed property. That is clear from clauses both preceding and following the clause as to interpretation. The very next clause provides for alienation of the estate; creating a power of correcting misconduct in that respect, not in the Ordinary, but in the Dean and Chapter of York. The power of correcting misconduct of the wardens, and of calling them to account, is in the Ordinary; not however as visitor: but he is to exercise it by a certain ecclesiastical form; which seems to be borrowed from the old form, that prevailed, while religious houses * existed in this country. So are powers of correction vested in various other persons in various cases.

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It has been pressed, that, if the Ordinary had so much visitatorial authority as to interpret the Statutes, he might interpret in one way; the Commissioners in another; and this Court also in a different one. If it is clear upon the whole of the Statutes, that the management of the lands was not intended to be in the Ordinary, as visitor, that difficulty must be met in the same manner, as if it had been expressly said, that he was to be the visitor for that purpose, and for that purpose only. The difficulty, if it exists,

exists, is in the nature of the Statutes; and, is the same, that arises from the Court's taking administration; where it is not given to the Ordinary. The Court must do the best it can; making such a construction, as it conceives the Ordinary would make; whose construction would have bound both the Commissioners and the Court: but my judgment proceeds upon this; that the words of these Statutes do not give the whole visitatorial power; and there is enough in the context to shew, that the visitatorial power as to the administration of the landed property was not intended to be given to the Ordinary, as visitor.

The Exceptions were over-ruled.

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(46) CLARKE *v.* WILSON.

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Nov. 17th.

THE Bill prayed the specific performance of an agreement by the Defendant, to purchase an estate; or that he may relinquish it. The Defendant admitted the agreement; but insisted, that the Plaintiff was the natural son of an *Englishman*, born in *Portugal*; and therefore an alien; and that he might make a good title by procuring an Act of Naturalization.

Purchaser, having taken possession, but objecting to the title, required either to pay in the purchase-money, or deliver up possession.

The Plaintiff moved, that the Defendant might pay into Court the purchase-money and interest. The Defendant was in possession of the estate.

The Lord CHANCELLOR said, he thought the Plaintiff might require the Defendant to pay the purchase-money, or to give up possession of the estate (47).

(46) *Ex Relatione.*

ferences. In that case possession was taken under one of the terms of the contract: so in *Gell v. Watson*, 3 *Madd.* 225.

(47) *Wickham v. Evered*, 4 *Madd.* 53. See *Dixon v. Astley*, 1 *Mer.* 133. Post, Vol. XIX, 564, and the re-

Serjeant HEYWOOD was appointed a *Welch* Judge in *March*, 1807.

Mr. BALGUY was appointed a *Welch* Judge in *Hilary* Term, 1808.

Mr. CLARKE was appointed one of his Majesty's Counsel in the Vacation after *Trinity* Term.

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HOTHAM v. SUTTON.

1808.

Nov. 21st.

PHILADELPHIA HOTHAM by her Will, dated the 15th of *January*, 1787, reciting a settlement, and her power of appointment over several funds of stock, and sums of money; which she enumerated, declared her intention not to execute her power; and farther reciting, that she was possessed of 12,700*l.* 3 *per cent.* Consolidated Bank Annuities, standing in her name, gave and bequeathed the same or so much of such Bank Annuities as should be standing in her name at the time of her death, to her executors; upon trust during the joint lives of Sir *Beaumont Hotham* and Dame *Susannah*, his wife, and the life of the survivor to pay and apply for and towards the maintenance and education of the testatrix's eldest son *Beaumont Hotham* the whole or so much of the dividends of the said Bank Annuities as to the guardians of her said son should seem reasonable, until he should attain the age of twenty-one years; and, after he should have attained that age, upon trust to pay the whole dividends on the said Bank Annuities unto her said eldest son for his own use; and, in case there should be any saving of dividends on the same Annuities

Testatrix, reciting, that she was possessed of 12,700*l.* 3 *per cent.* Consolidated Bank Annuities standing in her name, gave and bequeathed the same or so much of such Bank Annuities as should be standing in her name at her death. At the date of her Will and at her death she had near 15,000*l.* in that fund, besides other Stock. The

excess beyond the sum mentioned did not pass.

A residuary bequest in general terms. Revocation by a codicil as to "plate linen household goods and other effects (money excepted)." The exception prevents the restrained construction, in general, of the words "other effects:" viz. *Ejusdem generis*: Stock therefore, which does not pass under the word "money," was included, with leasehold and all personal property, except money and Bank notes.

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after such application for maintenance, she directed, that her trustees should invest the same in the purchase of Bank Annuities, to accumulate; and transfer such Bank Annuities, so to be purchased, to her said son on his attaining twenty-one years; and she authorized and empowered her said trustees during the lives of Sir *Beaumont Hotham* and his wife, or the survivor, or afterwards during the minority of her said son, if the said trustees should think proper, to sell so much of the said Bank Annuities as would raise any sum, not exceeding 5000*l.*; and to apply the same for purchasing her said son a Commission in the Army, or otherwise for his advancement: but in case that should not exhaust the power, or not to the full extent, then immediately upon the death of the survivor, if her said eldest son should then have attained twenty-one, or upon his attaining that age, to transfer to him so much of the same Bank Annuities as should then be of the value of 5000*l.* sterling or so much of the same Bank Annuities as with those, which might have been sold under the power, would make up 5000*l.* with the accumulation of the dividends upon the whole of the same Bank Annuities.

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The testatrix also directed, that her said trustees should stand possessed of so much of the said Bank Annuities as should remain after raising the said sum of 5000*l.*, and transferring or paying the accumulations aforesaid, upon trust immediately after the death of the survivor of Sir *Beaumont Hotham* and Dame *Susannah*, his wife, if her (the testatrix's) daughter should not have attained the age of twenty-one years, or been married, to permit so much of the said Bank Annuities to accumulate for the benefit of her said daughter until she should attain the said age or marry; and then to transfer the said Bank Annuities and accumulation to her said daughter: or, if she should have attained the said age,

or

or been married, in the life-time of Sir *Beaumont Hotham* and his wife, or the survivor, to transfer the said Bank Annuities unto her said daughter immediately after the death of such survivor, as aforesaid: but in case the testatrix's daughter should die under twenty-one, not having been married, then that they should stand possessed of the same Bank Annuities; and without prejudice to such power, as aforesaid, upon trust to transfer the same to her said eldest son upon his attaining twenty-one.

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The testatrix farther directed, that, in case her said eldest son should die under the age of twenty-one, or should attain that age, and die in the life of Sir *Beaumont* and Lady *Hotham*, or the survivor, her trustees should stand possessed of the said Bank Annuities, or so much thereof as should not have been raised under the power aforesaid, and the dividends thereon, upon trust for her younger son *George Frederick Hotham* in the same manner, as before directed as to the eldest son in the event of her daughter's dying under twenty-one and unmarried; and with the same power of raising 5000*l.* for the advancement of her said younger son; declaring her express will and intention, that in such case her \* daughter should not take any part of the said Bank Annuities; and all the rest and residue of her personal estate and effects of what nature or kind soever she gave and bequeathed unto her said younger children equally between them: the share of her son to be vested and payable at twenty-one; and that of her daughter at that age or marriage; with benefit of survivorship between them; to extend as well to the accruing as the original shares.

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The testatrix on the same day executed a codicil; thereby revoking so much of her Will, as related to  
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having given to her son *George Frederick Hotham* a share of her plate, linen, household goods and other effects (money excepted); and she did thereby give the whole thereof to her daughter; and in all other respects confirmed her Will.

The testatrix died soon afterwards; leaving her daughter *Philadelphia Hotham*, and two sons, *Beaumont Hotham* and *George Frederick Hotham*, her only surviving children. At the time of making her Will and at her death she was possessed of a leasehold house in *South Audley Street*, valued at 500*l.*; the sum of 14,767*l.* 16*s.* 9*d.* 3 *per cent.* Consolidated Bank Annuities: 2001*l.* 9*s.* 7*d.* 4 *per cent.* Annuities; and 60*l.* *per Annum* Imperial Annuities; all standing in her own name. She had also at her death 339*l.* 17*s.* 6*d.* at her banker's: 455*l.*, due to her upon a promissory note: plate, valued at 87*l.*: jewels and trinkets, valued at 172*l.*: linen at 132*l.*: household furniture at 440*l.*: wearing apparel at 56*l.*: books at 12*l.*: a carriage at 42*l.*: wines at 94*l.*: and 15*l.*, found in the house.

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The Bill, filed on behalf of the daughter, an infant, against the executors, and her two brothers, prayed, that * the interests of the Plaintiff and her brothers in the sum of 14,767*l.* 16*s.* 9*d.* 3 *per cent.* Consolidated Bank Annuities and the residue of the personal estate under the Will and Codicil may be adjusted; and the questions, made at the bar, were, first, whether by the bequest of the sum of 12,700*l.* 8 *per cent.* Consolidated Bank Annuities the larger sum in that fund, standing in her name at the time of making her Will and at her death, would pass: secondly, whether the Plaintiff was entitled under the Will and Codicil to all the residue of the personal estate, except such part as consisted of money.

Sir

Sir Samuel Romilly, and Mr. Benyon, for the Plaintiff.

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The sum of 12,700*l.* only of the 3 *per cent.* Bank Annuities passed under this bequest; and the remainder of that fund falls into the residue. The recital must be taken as the reason of the disposition; as the recital of an Act of Parliament gives the reason of the law. As to the excess of the fund, beyond the sum, mentioned in the recital, no intention is expressed. If she had been apprised of the fact, she might, or might not, have made the same disposition as to the whole. There is no opportunity of receiving a declaration of her intention as to that. Upon the reason of her disposition, as it is expressed, that she was possessed of 12,700*l.* in this fund, is the Court to infer, that she gives 14,000*l.* or 100,000*l.*? It cannot be represented, that she has given all her stock; and that the recital, that it amounts to a particular sum, is the effect of mistake and accident; which would raise a very different question.

As to the second question, if the clause of revocation in the beginning of the codicil had concluded with the words "other effects," the construction must have been * confined to effects *Ejusdem generis*: but the exception of money gives an explanation, which excludes that construction; shewing, in what respect she meant to limit that general expression; conceiving, that, unless qualified, it would comprehend all her property of every description; and meaning to except the single article, money. The restrained interpretation of the word "effects" therefore cannot be applied in this clause. Then what passes under the bequest of "*Money*?" It has always been considered, that money and bank notes in the possession of the testator, or at his banker's, would pass; and nothing else: the Plaintiff therefore under the codicil is entitled to the leasehold house, plate, linen, and

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every article of personal estate, except money and bank notes in the possession of the testatrix, or at her banker's.

Mr. *Richards*, and Mr. *Bell*, for the Defendant, the younger son *George Frederick Hotham*, upon the first question contended, with the Plaintiff, that under the bequest of the 3 *per cent.* Bank Annuities only 12,700*l.* passed.

With respect to the second question this codicil, made upon the same day as the Will, is only a partial revocation; and upon the word "effects" with reference to the subject, and the previous expressions, the intention is plain, to take out of the residue, bequeathed by the Will, articles of a certain description only, specified by the codicil: plate, linen, and household goods: the Will containing nothing as to such articles.

Sir *Arthur Piggott*, for the Defendant the eldest Son.

[*325] This is a specific bequest of what stock in the 3 *per cent.* Consolidated Bank Annuities the testatrix had. *She had also other stock: 4 *per cents.* and Imperial Annuities. Reciting, that she was possessed of 12,700*l.* 3 *per cents.* she bequeaths "the same or so much of "such Bank Annuities" as shall be standing in her name at her death: not so much of 12,700*l.* but so much of that particular fund; having stock in other funds, not alluded to in any part of the Will; but left to pass as the general personal estate. Why is this description, "such Bank Annuities" to be confined to the sum; though a greater fund was standing in her name at her death? That description refers properly to the fund, not to the sum. The other construction would defeat the provision for the advancement of the two sons;

sons; charged upon this fund alone; as the reduced sum would be equal only to one such provision.

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Sir Samuel Romilly, in Reply.

Upon the Defendant's construction, that the testatrix meant to give what Bank Annuities she should have at her death, it is immaterial, whether the testatrix was possessed of this fund at the time of making her Will, or afterwards purchased it; and that, if she had purchased stock in this fund to any amount, the whole must have passed under this clause. The true construction is, that this is a specific bequest of the stock described: involving all the consequences; if she had sold it; and purchased other stock. The other construction also requires the Court to strike the recital out of the Will; as having no effect. What is the purpose of that recital upon the supposition, that she intended to give whatever stock she should have? The Plaintiff's construction admits, that she might have contemplated the case, that the eldest son might want a provision during her life; and that for the purpose of making that provision she might sell part of the fund; leaving the residue of it to the operation of this clause.

The Lord CHANCELLOR.

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It is very probable, that this testatrix, if she was here, might decide both the questions, that have been made differently from what must, I think be the decision of them. Upon the introductory clause of this Will, reciting the settlement, and her power of appointment over the several funds and sums of money, which she enumerates, expressly distinguishing stock and money, and declaring her intention not to execute her power, the observation is fair, that probably it is the language of the person, who drew the Will; adopting the language of the person, who drew the settlement. The only conclusion from that

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that clause therefore is, that it pointed out to her, that there were different modes of expression, applicable to Bank Annuities and to money. If the bequest of the Bank Annuities stopped with the words "the same" there could be no doubt, that it would pass only the 12,700*l*. The difficulty arises upon the words, that follow: "or so much of such Bank Annuities" as should be standing in her name at the time of her death. As she was possessed of other funds, it must be admitted, that property in the funds was intended by her to pass under the residuary disposition; and that the 12,700*l*. 3 *per cents*. would have passed by it, if the object of the disposition as to that fund had failed.

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With respect to the second question, the doctrine appears now to be settled in this Court, that the words "other effects" in general mean effects *Ejusdem generis* (48). I cannot help entertaining a strong doubt, whether this testatrix, if asked, whether she meant effects *Ejusdem generis*, or contemplated the share of all, which she had considered her effects in the Will, would not have answered, that the latter was her meaning. Her expression is conclusive upon that. Money cannot be represented *as *Ejusdem generis* with plate, linen, and household goods. The express exception of money out of the "other effects" shews her understanding, that it would have passed by those words; that express words were required to exclude it; and by force of the exclusion in the excepted article she says, she thought, that the words of her bequest would carry things, not *Ejusdem generis*.

(48) Ante, *Rawlings v. Jennings*, Vol. XIII, 39. Post, in *Campbell v. Prescott*, 500, the word "effects" alone in a Will was held equivalent to property. See farther as to the restraint of general words, ante, *Porter v. Tournay*, III, 311, and the note, 314.

generis. This disposition must therefore be taken to comprehend all, that she has not excluded; which is money only. The question then comes to be, whether stock, supposing it to be part of the residue, is money; whether it was ever considered money in such a bequest as this. There is no instance of that. Stock does not pass by the word "money;" and the argument is fortified by what I must, as a Judge, take to be a deliberate contrast of stock and money throughout this Will.

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The other question is, whether the excess of 3 *per cent.* Bank Annuities, beyond the amount of 12,700*l.* passes under the residuary clause, or is embraced by the trust with that sum. That is put in different ways upon the whole clause; admitting it to be clear, that, if it stopped with the words "the same" no more than 12,700*l.* would have passed. The testatrix either thought, she had only that amount; or knew, she had more. I believe, she thought, she had no more: but then the argument arises, that the fund is not sufficient to answer the double provision for advancement of the two sons, in certain events, amounting to 10,000*l.*; as upon that supposition she must have intended to apply only the fund of 12,700*l.* to those purposes. Another way of considering it is, that this is a bequest, not of 12,700*l.* 3 *per cent.* Bank Annuities, but of so much of such Bank Annuities as should be standing in her name at her death. That is a very difficult construction: first, as, if that was her intention, though there should be ten times that amount, there was no reason for reciting, that she was possessed of this sum of 12,700*l.*: secondly, from the consequence, that, if she had sold out the whole of the stock, and remained for some time without any, had afterwards bought other stock, this Court must have held, that she had bequeathed, not what she had at the date

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date of the Will, but what she had at the time of her death. Unless it appears upon the Will, that she did not know the state of her property, I cannot suppose her ignorant of it; and it does not follow, from this recital, that, understanding, that she possessed no more than 12,700*l.*; she intended to give all, she possessed, whether more or less; which would amount to this; that, measuring her bounty, and the extent of it, as she appears to do by the recital, she intended to give 200,000*l.* if she should have it. Between the two propositions, that she meant to dispose of so much of such Bank Annuities, as by this recital she says she has, or, of such as she might have, though, upon the latter construction, if she acquired stock to the amount of 200,000*l.* the whole must have passed to make good a bequest, the extent of which she measures by this recital as to 12,700*l.* the better legal opinion seems to be, that this sum only passed; and the excess is comprehended in the residue.

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1808.

May 13<sup>th</sup>, 14<sup>th</sup>.

Nov. 26<sup>th</sup>.

MACKRETH v. SYMMONS.

Vendor's lien  
 for purchase-  
 money unpaid  
 against the  
 vendee, volun-

**T**HE Bill stated, that in the years 1783 and 1794 the Plaintiff was indebted to *John Manners* in several sums, amounting in the whole to 13,500*l.*; for which  
 teers, and purchasers with notice, or having equitable interests only, claiming under him; unless clearly relinquished; of which another security taken, and relied on, may be evidence; according to the circumstances; the nature of the security, &c.: the proof being upon the purchaser; and failing in part, upon the circumstances, another security being relied on, may prevail as to the residue.

As to marshalling the assets of the vendee by throwing the lien upon the estate, *Quere.*

which sums *John Martindale*, as surety, joined the Plaintiff in bonds. In 1790 *Martindale*, having upon a settlement of accounts with the Plaintiff in 1785 taken credit for payment to *Manners* of 3000*l.* undertook to discharge the remaining 10,500*l.*; and they settled an account accordingly. Other accounts were afterwards settled between them: the last in *February*, 1792; upon which a balance of 54,000*l.* was due to *Martindale*, including 10,393*l.* 17*s.* the value of annuities, granted by the Plaintiff; against which *Martindale* agreed to indemnify the Plaintiff in consideration of the Plaintiff's agreeing to pay him the amount. A bond for 20,000*l.* was given accordingly: and a mortgage in fee was executed by the Plaintiff to *Martindale* for the balance of 54,000*l.*

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MACKRETH  
v.  
SYMMONS.

By indentures of lease and release, dated the 30th and 31st of *October*, 1793, reciting an agreement by the Plaintiff to sell the reversion of the mortgaged estates to *Martindale*, which was valued at 60,000*l.* composed of the principal and interest, due upon the mortgage, those estates were conveyed to *Henry Martindale* and his heirs, to the use of the Plaintiff for life; with remainder to *John Martindale* in fee.

The Bill farther stated, that *John Martindale* did not, according to his undertaking, pay the sum of 13,500*l.* \* to *Manners*, nor the value of the annuities; which sums constituted part of the consideration for his purchase of the reversion of the estate. In *September*, 1797, a Commission of Bankruptcy issued against him; under which *Manners's* representatives proved the debt upon the bonds; and received dividends: the Plaintiff being obliged to pay remainder of the debt on account of those bonds; being 14,128*l.* 3*s.* 9*d.* besides costs, and several sums on account of the annuities.

[ \* 330 ]

*John*



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John Martindale before his bankruptcy had contracted to execute a mortgage to the Defendant of the reversion, comprised in the indentures of 1793; and the Plaintiff claiming a lien upon the estate for the payments he had made in consequence of *Martindale's* failure to fulfil his engagements, gave notice to the assignees under the Commission. In 1798 *Symmons* obtained a Decree, that the assignees should execute a mortgage of the reversion to him, expressly without prejudice to the Plaintiff's claim; and afterwards filed a Bill of foreclosure against the assignees; and obtained a Decree; *Mackreth* not being a party to that suit. The legal estate was vested in *Coutts*, as a trustee under a conveyance by *Mackreth* and *Martindale* in 1793, to secure annuities of 2000*l.*

The Bill, filed by *Mackreth*, prayed a declaration, that the Plaintiff has a lien upon the reversion of the estates, sold to *Martindale*, and mortgaged to *Symmons*, for the payments he had been obliged to make, and those sums, which he may hereafter pay in respect of the annuities, &c.

The Defendant *Symmons* by his answer denied, that he had any notice, prior to his entering into the agreement with *Martindale*, that the Plaintiff had not received full consideration; and submitted, that he had no lien.

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Sir *Samuel Romilly* and Mr. *Wriottesley*, for the Plaintiff.

The equitable lien of a vendor upon the estate sold for the purchase-money, as against the vendee, and even though a bond was taken, is established by a great number of cases, from *Chapman v. Tanner* (49), to *Nairn v. Prouse*.

Prowse (50). In *Austen v. Halsey* (51) your Lordship considered it as clearly settled; except where upon the contract evidently the lien by implication was not intended; and the case of *Hughes v. Kearney* (52) is another direct authority: Lord *Redesdale* laying down as a very clear rule, that in all cases the vendor has the lien; and that it lies upon the purchaser to shew a special agreement, excluding it: that case being decided upon that ground. It cannot be admitted certainly against a purchaser for valuable consideration without notice: but this Defendant has not that character; having merely an equitable agreement for a security, not performed, when *Martindale* became a bankrupt: the Plaintiff giving notice to the assignees: and the Decree, obtained by the Defendant *Symmons* for a mortgage to him, expressing, that it was without prejudice to the claim of this Plaintiff. Certainly a former debt is sufficient to sustain a purchase, as for a valuable consideration: but it is necessary, that a party, taking a conveyance for such a consideration, should not have had notice of the claim, when he took the conveyance. There are but two periods, to which the point of notice can apply: first, the time, when the consideration was advanced: secondly, when the conveyance was executed; and even where a consideration has actually passed, it is necessary to state in pleading, that there was no notice at either period: otherwise the purchaser cannot protect himself: *Wigg v. Wigg* (53). In this case it is essential, that there should not have been notice at the latter period; before which notice is clearly established. The estate was never properly out of the hands of the Plaintiff. He had not taken a security, carved out by himself; which might preclude the equitable lien

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(50) *Ante*, Vol. VI, 752.

(52) 1 *Schoales & Le Froy*,

(51) *Ante*, Vol. VI, 475; 132.

see 483.

(53) 1 *Atk.* 382.

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lien he once had ; which therefore still remains. From the nature of this transaction, the consideration being a former debt, no money actually passing, no such hardship can arise from enforcing the lien as in the case of a purchaser for valuable consideration, actually paid in that transaction ; who is affected by notice.

If however this Defendant is to be considered as a purchaser for valuable consideration without notice, so that the lien cannot prevail against him, the Plaintiff is entitled to consider him as only a mortgagee ; having contracted with *Martindale*, as against whom the lien is good, for a mortgage. This Plaintiff therefore cannot be affected by the Decree for a foreclosure, obtained by this Defendant ; who, having notice of the Plaintiff's claim, did not make him a party.

Mr. Richards, Mr. Alexander, and Mr. William Agar, for the Defendant.

[*333] There is nothing in the circumstances of this case, depriving this Defendant of the protection, due to a purchaser for valuable consideration without notice : his transaction with *Martindale* being perfectly fair : the vendor claiming a preference by way of lien for the purchase money, remaining unpaid ; as an equitable charge, prior in time ; though he took the security of *Martindale* to that extent. Under such circumstances * the lien has never been established : nor can the inference, necessary to maintain it, be collected either upon principle or authority. The general case of lien, as between vendor and vendee, is admitted ; where there is no special agreement : no security taken in respect of the purchase-money : but this Equity has not been carried beyond that simple case of vendor and vendee. In the case of *Chapman v. Tanner* (54) there was a special agreement :

(54) 1 Vern. 267. See ante, Vol. VI, 757. Amb. 736.

agreement: the title-deeds were kept by the vendor: a deposit of the title-deeds of itself amounting to an equitable charge. Other cases, besides those, which have been mentioned, in which this point arose either directly, or incidentally, are *Bond v. Kent* (55); the case of a mortgage of the purchased estate for part of the money, and a note for the remainder. *Pollexfen v. Moore* (56); a very perplexed case, often cited: *Fawell v. Heelis* (57): *Blackburn v. Gregson* (58); which is merely the opinion of Lord *Loughborough*; who desired to have the point farther considered: *Trimmer v. Bayne* (59). The result of all of them is, that, where a security is given, there is no place for this Equity: the purchaser certainly having to shew, that it does not exist. Here a bond was given by *Martindale*: the security stipulated between the parties; and therefore the lien, substituted by Equity, where there is no stipulation for a particular security, cannot be raised.

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Sir *Samuel Romilly*, in Reply.

The Plaintiff being called upon, and obliged to pay, the debt, against which *Martindale* undertook to indemnify him, that undertaking forming the consideration of *Martindale's* purchase, he cannot upon the ground of fraud be permitted to retain the estate. The lien therefore is clear in respect of the 10,500*l*. The distinction as to the annuities rests upon the single circumstance, that a security by a bond of indemnity was taken; which is confined to the annuities. If this Plaintiff had filed a Bill against *Martindale*, while in possession, he would have been compelled to pay the annuities out of the purchased

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(55) 2 *Vern.* 281.

3d edit. 422, note. 2 *Dick.*

(56) 3 *Atk.* 272.

485.

(57) *Amb.* 724. 1 *Bro. C. C.*

(58) 1 *Bro. C. C.* 420.

(59) *Ante*, Vol. IX, 209.

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chased estate; and a Receiver would have been appointed. No stronger instance of bad faith, no act more unconscientious, can be stated, than taking an estate in consideration of making payments, and by a direct violation of the contract permitting those payments to fall upon the vendor.

As to this Defendant, if from the passage, appearing in the report of *Pollexfen v. Moore* it is supposed, that the lien cannot be extended to a purchaser from the original vendee, it would be perfectly ineffectual: but that proposition is contradicted by many authorities. In *Walker v. Preswick* (60) it is distinctly laid down, that the lien prevails against a purchaser with notice. Upon what principle can such a distinction between this and any other Equity be maintained? The point is expressly decided in the same way in *Gibbons v. Baddall* (61): viz. if *A.* sells an estate; taking a promisory note for part of the purchase-money, and then the purchaser sells to *B.* who has notice, that *A.* had not received all the money, the land is in Equity chargeable with the money, due on the note. The Defendant cannot be represented as a purchaser without notice, merely as not having notice, when he advanced his money. It is true, not then having this estate in contemplation, he could not have \*notice at that time: but, to sustain a purchase as for valuable consideration without notice, it is essential, that there should not have been notice either when the money was advanced, or, when the conveyance was executed. That doctrine has been always held from the earliest period, in *More v. Mayhow* (62), to the time of Lord Hardwicke in *Wigg v. Wigg* (63); and the reason is, that  
 some

[ \* 335 ]

(60) 2 Ves. 822.

v. Naish, 3 P. Will. 397;

(61) 1 Eq. Ca. Ab. 682, n.

where the notice was before  
 payment of the money.

(62) 1 Cas. in Ch. 34.

(63) 1 Atk. 382. *Tourville*

some suspicion arises from not taking the legal estate, when the money is advanced. The Defendant, having the means, by acquiring the legal estate, of placing himself in a situation, in which the want of notice would avail, merely took an agreement; and, having only an equitable title, cannot maintain the plea of purchaser for valuable consideration without notice. The doctrine, that certainly prevails between mortgagees, that, the equities being equal, a subsequent mortgagee having got in the legal estate, may exclude a prior incumbrance, applies only, where the money was advanced upon the credit of the estate; not, where the estate was not in contemplation, and other securities were looked to; which is the case of this Defendant, when he advanced his money; and upon that ground a judgment creditor, taking in a prior mortgage, cannot tack (64).

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*The Lord CHANCELLOR.*

With regard to the doctrine, to which you are now alluding, is there any case, where a third mortgagee has excluded the second, if the first mortgagee, when he conveyed to the third, knew of the second. When the case of *Mawndrell v. Mawndrell* (65) was before me, I looked for, but could not find such a case; that, where there was bad faith on the part of the first mortgagee, that Equity was applied?

Whether a third mortgagee, taking in the first, can exclude the second, where the first, when conveying to the third, knew of the second, *quære*.

Sir

(64) *Brace v. The Duchess of Marlborough*, 2 P. Will. 491.

(65) *Ante*, Vol. X, 246. It is material to a correct understanding of this subject, and the case of *Willoughby v. Willoughby*, (1 Term Rep. 763), where it is fully considered by Lord Hardwicke,

to observe, that the notice to the *puise* incumbrancer himself, depriving him of this advantage, is notice, when he takes his original security; not, when he takes in the prior incumbrance. See 2 Ves. 573, *Wortley v. Birkhead*.

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Sir *Samuel Romilly*, in Reply.

I do not believe that was ever decided; and there would be great difficulty in deciding it in favour of the third mortgagee; who puts himself in the place of the first. The result of the authorities, and of the circumstances, to which they are to be applied, is, that, a part of the money, which was the consideration of the original purchase, remaining unpaid, the Court will raise the lien; and will enforce it against a second purchaser, with notice; that universally the time of the conveyance, as well as the time of the advance, is material with regard to notice; and that this Defendant clearly had notice before the conveyance.

*The Lord Chancellor.*

[ \*337 ]

Upon the special circumstances of this case I shall postpone my judgment: but I should be very unwilling to leave some of the doctrine, that has been brought into controversy, with so much doubt upon it, as would be the consequence of deferring the judgment without taking some notice of it. The settled doctrine, notwithstanding \* the case of *Fawell v. Heelis* (66), is, that, unless there are circumstances, such as we have been reasoning upon, where the vendor conveys, without more, though the consideration is upon the face of the instrument expressed to be paid, and by a receipt, indorsed upon the back, if it is the simple case of a conveyance, the money, or part of it, not being paid, as between the vendor and the vendee, and persons, claiming as volunteers, upon the doctrine of this Court, which, when it is settled, has the effect of contract, though perhaps no actual contract has taken place, a lien shall prevail; in the one case for the whole consideration; in the other for that part of the money, which was not paid. I take that to have been the settled

settled doctrine at the time of the decision of *Blackburn v. Gregson* (67); which case so far shook the authority of *Fawell v. Heelis* as to relieve me from any apprehension, that Lord *Bathurst's* doctrine can be considered as affording the rule, to be applied as between the vendor and vendee themselves, and persons, claiming under them.

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There is a case, *Smith v. Hibbard* (68), reported nowhere but in *Dickens*, which seems to decide this point. There is also another case, besides those, which have been mentioned, shewing the opinion of Lord *Hardwicke*, that the lien prevails: *Harrison v. Southcote* (69): the case of a Papist vendor; for whom, Lord *Hardwicke* says, the lien would not be raised; as that would be giving an interest in land to a Papist: the specialty of that proving, that the lien prevails in general cases. In the case of *Elliot v. Edwards* (70) Lord *Alvanley* was very strong upon it. There was a covenant for payment of the money upon the first purchase; and also an undertaking by a surety: strong circumstances to shew, that, as between the vendor and vendee, there is no intention to rely upon the lien. The point was not decided, in that case: but Lord *Alvanley* lays down the doctrine, as I have stated it; that even in the hands of another person, with notice, the lien remains. In *Gibbons v. Baddall* (71) the lien was held to be clear against a second purchaser, with notice. There is a very old case, in *Cary* (72); which I have heard cited as one of this class: but I have some doubt

[ \*338 ]

(67) 1 Bro. C. C. 420.

(71) 2 Eq. Ca. Ab. 632.

(68) 2 Dick. 730.

(72) *Hearn v. Botelets*,

(69) 2 Ves. 389; see 393.

*Cary*, 25.

(70) 3 Bos. & Pul. 181; see

183.



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*Profert* dis-  
pensed with,  
where a bond  
is lost.

doubt, whether it is not a case of equitable interposition upon another ground. The circumstance, leading me to that doubt is, that there was a lost bond; and the modern doctrine of dispensing with *profert* (73) was not at that time known. The *Lord Chancellor* might therefore consider himself as having jurisdiction in that case to direct payment of the money, due upon that bond out of the estate.

In *Austen v. Halsey* (74) what I stated upon this subject was not said without much consideration. I had not at that time, nor have I now, the least doubt, that it is the doctrine. I have some doubt upon another point: taking the vendor to have the lien, whether the Court will in case of the death of the vendee marshal the assets; so as to throw the lien upon the purchased estate. It has often been said, that the case of *Coppin v. Coppin* (75) stated as an authority, that the Court will not do that. The *Lord Chancellor* in his judgment takes no notice of that point. In that case the vendor happened to be the heir of the vendee; so that the estate was at home; and it was held, that being also the executor, he was entitled to retain the purchase-money out of the personal assets. That decision requires a good deal of consideration. If the estate had been in a third person, the general doctrine as to a person having two funds to resort to might be thought to have an immediate application; and the express terms of the decree in *Pollexfen*

[ \*339 ]

(73) See the note, ante, 346. *Ex parte Parkes*, 1 *Glyn & Jam.* 228. *Winter v. Lord*

(74) Ante, Vol. VI, 475; *Anson*, 1 *Sim. & Stu.* 434, see 483. *Trimmer v. Bayne*, 444, 445. *Cood v. Pollard*, IX, 209. Post, XVI, 278. 9 *Pri.* 544. 10 *Pri.* 109. *Grant v. Mills*, 2 *Ves. & Bea.* (75) 2 *P. Will.* 291. See 306. *Ex parte Peake*, 1 *Madd.* - *Ca. Ch.* 28.

*Pollexfen v. Moore* (76) might be found very inconsistent with it.

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It is not however necessary to decide that point; as this is an Equity, that in ordinary cases will affect a purchaser. Upon principle, without authority, I cannot doubt \* that. It goes upon this; that a person, having got the estate of another, shall not, as between them, keep it, and not pay the consideration; and there is no doubt, that a third person, having full knowledge, that the other got the estate without payment, cannot maintain, that though a Court of Equity will not permit him to keep

[ \*340 ]

(76) 3 *Atk.* 272. That case has always raised considerable difficulty, (see *Trimmer v. Bayne*, ante, Vol. IX, 209), from the ambiguous passage, in the Report of the judgment, that this Equity will not extend to a third person, but is confined to the vendor and vendee; which admits a double interpretation; that the vendor cannot enforce the lien against a third person; without any qualification as to notice, or consideration; and, secondly, that the lien shall not be enforced against the vendee in favor of a third person; as, in the instance, that immediately follows, by marshalling; in which sense it was not easy to reconcile that

passage with the declaration of the Decree, supposed to proceed upon the lien, that the deficiency of the personal assets of the purchaser should be made good out of the purchased estate, *so far as the personal estate of the purchaser should be applied in payment of the purchase-money*. The qualification of the Decree by those latter words, and the fact, that the vendor by agreement retained the deeds, as a security for the money, amounting to an equitable mortgage, are conceived by Mr. *Sugden* to relieve the case from all difficulty. See *The Law of Vendors and Purchasers of Estates*, 360, 361. 2d edit.; 468, 470, 5th edit.

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 ~~~~~  
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 v.
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keep it, he may give it to another person, without payment. It is not however necessary to discuss that upon general principles; as it has been repeatedly stated by authorities, that ought at this time to bind upon that point.

Another principle, as matter of general Law is involved in this case: what shall be sufficient to make a case, in which the lien can be said not to exist. It has always struck me, considering this subject, that it would have been better at once to have held, that the lien should exist in no case, and the vendor should suffer the consequences of his want of caution; or to have laid down the rule the other way so distinctly, that a purchaser might be able to know, without the judgment of a Court, in what cases it would, and in what it would not, exist. Lord *Bathurst* seems to have thought, a note would put an end to it. Other Judges, of very high authority, dissented from that; as appears by the case of *Gibbons v. Baddall* (77) and *Hughes v. Kearney* (78). It does not necessarily follow from a written contract, giving another remedy, that the lien was intended not to exist. It is very difficult then to distinguish the case, where a note, or bond, is given for part of the money. In the case of *Bond v. Kent* (79), where the estate sold was mortgaged for part of the money, and a note taken for the rest, there was strong negative evidence, that the vendor was not intended to be a mortgagee for the rest. The case, put by the *Master of the Rolls* in *Nairn v. Prowse* (80), of a mortgage upon another estate, also afforded strong, perhaps not quite conclusive, evidence, against the lien; considering the value of the mortgaged estate:

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(77) 2 *Eq. Ca. Ab.* 632.

(80) *Ante*, Vol. VI, 752;

(78) 1 *Sch. & Lef.* 132.

see 760.

(79) 2 *Vern.* 281.

estate: in general much more than the amount of the money. It does not however appear to me a violent conclusion, as between vendor and vendee, that notwithstanding a mortgage the lien should subsist. The principle has been carried this length; that the lien exists; unless an intention, and a manifest intention, that it shall not exist, appears.

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This case remains to be considered upon its own circumstances, with reference to the points I have stated. The questions are, first, supposing the lien would have existed as to the gross sum, the debt to *Manners*, and the annuities, or their value, whether the circumstances of silence as to the debt, and the indemnity taken against the annuities, which is very important, amount in equity to evidence of a manifest intention to abandon the lien: if they do, another very considerable point is, whether, the lien having been abandoned, the Plaintiff can set himself up, as a mortgagee, claiming to redeem the Defendant. If the lien is to be considered as not abandoned, the question will be, not whether a purchaser with notice would be affected by the lien; which, as general doctrine, I admit; but whether under the circumstances, attending the contract with, and conveyance to, this Defendant, it shall prevail against him. Upon the particular circumstances the case must stand for judgment.

The Lord CHANCELLOR, having stated the case very particularly, and observing, that the legal estate in the premises was, before the assignees of *Martindale* executed the agreement for a mortgage to *Symmons*, vested under a former conveyance by *Mackreth* in a trustee to secure

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 ~~~~~  
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 v.  
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secure annuities, granted by him, pronounced the following judgment:

This case, when it was argued, and since, has appeared to me to involve a question of very great importance; with regard to which I am not able to find any rule, which is satisfactory to my mind. If I had found, laid down in distinct and inflexible terms, that, where the vendor of an estate takes a security for the consideration, he has no lien, that would be satisfactory; as, when a rule, so plain, is once communicated, the vendor not taking an adequate security, loses the lien by his own fault. If, on the other hand, a rule has prevailed, as it seems to be, that it is to depend, not upon the circumstance of taking a security, but upon the nature of the security, as amounting to evidence, as it is sometimes called, or to declaration plain, or manifest intention, the expressions used upon other occasions, of a purpose to rely, not any longer upon the estate, but upon the personal credit of the individual, it is obvious, that a vendor, taking a security, unless by evidence, manifest intention, or declaration plain, he shews his purpose, cannot know the situation, in which he stands, without the judgment of a Court, how far that security does contain the evidence, manifest intention, or declaration plain, upon that point. That observation is justified by a review of the authorities; from which it is clear, that different Judges would have determined the same case differently; and, if some of the cases, that have been determined, had come before me, I should not have been satisfied, that the conclusion was right.

[ \*343 ]

This Bill insists upon a lien, in respect of these annuities: to be paid all, that the Plaintiff himself has paid; and either as to the original value, or the present value, or the future payments. I state that claim in these

these different terms; as, to determine, what is the lien, it is necessary to point out the amount of it; and how it is to be calculated. Some doubt was thrown in the argument upon the question of lien between the vender and vendee: but it was not carried far; and it is too late to raise a doubt upon it: but it is insisted, that the lien does not prevail against third persons, even with notice of the situation of the vendor and vendee. It may be of use to state the cases upon this subject in the order of time.

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SYMMONS.

The earliest case, not very applicable, is in *Cary* (81), and most of the Abridgments; which imperfectly collect the authorities upon this head. According to my own understanding that case is to be classed rather among those of relief in equity upon a security, that has been lost (82), than under this head: but the fact of its existence is a circumstance of evidence, that this doctrine has obtained in professional practice. There is no other case between that and *Chapman v. Tanner* (83); which is very imperfectly reported; and its authority is weakened by the observation in subsequent cases, that there was a special agreement, that the vendor should keep the writings; and it is stated as a fact, that he had not taken any security. Taking it to be a decision in favor of the lien under those circumstances, the declaration of the Court, what was the natural equity, shews strongly, how the law upon this subject was understood; and that case therefore has considerable weight. The doctrine is probably • derived from the Civil Law as to goods; which goes farther than our law; by which, though the right of stop-

Relief in  
Equity upon  
a security  
lost.

Vendor's lien  
[\*344] proba-  
bly de-  
rived from the  
Civil Law as to  
goods; which  
goes farther  
than the law

(81) *Hearn v. Botellers*,  
*Cary*, 25.

(82) See the note, ante,  
Vol. V, 238.

(83) 1 *Vern.* 267.

of *England*; by which the lien, giving the right to stop *in Transitu*, is gone, where possession, actual or constructive, has been taken: the lien by the Civil Law prevailing even against actual possession.

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page in *Transitu* is founded upon natural justice and equity, yet, if possession, either actual or constructive, was taken by the vendee, the lien is gone. That is not so by the Civil Law. The Digest states (84) "*Quod vendidit non aliter fit accipientis quam si aut pretium nobis solutum sit, aut satis eo nomine factum, vel etiam fidem habuerimus emptori sine ulla satisfactione*;" which points at this article of security: but with those excepted cases the lien according to the Civil Law is so strong, that the goods may be taken out of the possession of the individual, who had obtained actual or constructive possession of them.

The next case is *Bond v. Kent* (85); the circumstances of which are special: a mortgage for part of the money; and a note for the residue. It was urged with considerable, perhaps not inclusive, weight, that the express charge of a part gave a ground for the inference, that a lien for the residue was not intended. The case however goes to prove, that in equity this lien was supposed to exist; amounting to an admission, that without those special circumstances there would have been a lien.

The next case is *Coppin v. Coppin* (86); where the doctrine of *Pollexfen v. Moore* (87), as to marshalling, was practically, though I doubt whether it ought to have been, admitted. I should mention *Gibbons v. Bad-dall* (88); where it is expressly stated, that the lien remained; though a note was given for part of the purchase money: but I cannot ascertain the date of that decision. In [ \*345 ] \* *Pollexfen v. Moore* (89) Lord *Hardwicke* affirms the lien

(84) *Dig. Lib.* 18, Tit. 1,  
 L. 19..  
 (85) 2 *Vern.* 281.  
 (86) 2 *P. Will.* 291.

(87) 3 *Atk.* 272.  
 (88) 2 *Eq. Ca. Ab. tit.*  
*Purchaser*, 682, note.  
 (89) 3 *Atk.* 272..

lien of the vendor upon the estate for the remainder of the purchase-money; considering the vendee from the time of the agreement a trustee as to the money for the vendor; but adds, that "this equity will not extend to a third person."

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v.  
SYMMONS.

If that is to be understood, that this equity would not extend to a third person, who had notice, that the money was not paid, Lord *Hardwicke's* subsequent decisions contradict that: if the meaning is, that he would follow the case of *Coppin v. Coppin*, and that, if the vendor exhausted the personal assets, the legatee of the purchaser should not come upon the estate, there is great difficulty in applying the principle; as it would then be in the power of the vendor to administer the assets, as he pleases; having a lien upon the real estate to exhaust the personal assets, and disappoint all the creditors; who, if he had resorted to his lien, would have been satisfied; and in that respect, with reference to the principle, the case is anomalous.

The next case, in which the doctrine was admitted, is *Harrison v. Southcote* (90); followed by *Walker v. Preswick* (91); which case, it is remarkable, was not cited in *Fawell v. Heelis* (92); and in *Burgess v. Wheate* (93) Sir *Thomas Clarke* lays down the rule both as to vendor, and vendee thus: "Where conveyance is made prema-

Lien of Ven-  
dee, having  
paid prema-  
turely, analo-  
gous to that  
of Vendor.

- "turely, before money paid, the money is considered as  
"a lien on that estate in the hands of the vendee: so,  
"where money was paid prematurely, the money would  
"be considered as a lien on the estate in the hands of  
"the
- (90) 2 *Ves.* 389; see 393. 3d edit. 422, note. 2 *Dick.*  
(91) 2 *Ves.* 622. 425.  
(92) *Amb.* 724. 1 *Bro. C.C.* (93) 1 *Black.* 123; see  
150.



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"the vendor for the personal representatives of the purchaser." *Tardiff v. Scrughan* (94) is very material upon this point; as it is represented (95) as a case, in which the lien was held to attach upon the two moieties of the estate: but it has been also considered (96) a case, whether of lien upon the land or not, for contribution upon the circumstances between the sisters; giving the one sister a right to call upon the husband of the other to pay a moiety of the annuity. In another case also, *Powell v. ———*, whether accurate, or not, I cannot trace, Lord *Camden* determined in favor of the lien.

In *Fawell v. Heelis* (97) Lord *Bathurst's* opinion certainly was, for reasons best stated in the case of *Nairn v. Prowse* (98) by Sir *Samuel Romilly*, that the bonds taken by the vendor, furnished evidence, that credit was not given to the land; and therefore there was no lien. In *Beckett v. Cordley* (99) Lord *Thurlow* says, it was compared to the case of a person selling an estate, and not receiving the money; and therefore there is a lien; asserting the general doctrine, as familiar; but distinguishing that case upon the nature of the transaction: younger children joining the eldest in a mortgage; discharging the estate from their portions; and by their consent the whole money being paid to the eldest son: the lien being discharged by that transaction.

In the argument of *Blackburn v. Gregson* (100) Lord  
*Kenyon*

- |                                        |                                          |
|----------------------------------------|------------------------------------------|
| (94) Cited <i>Amb.</i> 725, 6.         | (97) <i>Amb.</i> 724. 1 <i>Bro. C.C.</i> |
| 1 <i>Bro. C. C.</i> 423: before        | 3d edit. 422, note. 2 <i>Dick.</i>       |
| Lord <i>Camden</i> , in Chancery,      | 425.                                     |
| <i>Dec.</i> 8th, 1769.                 | (98) <i>Ante</i> , Vol. VI, 752.         |
| (95) 1 <i>Bro. C. C.</i> 423,          | (99) 1 <i>Bro. C. C.</i> 353;            |
| <i>Blackburn v. Gregson.</i>           | see 353.                                 |
| (96) <i>Amb.</i> 726, <i>Fawell v.</i> | (100) 1 <i>Bro. C. C.</i> 420.           |
| <i>Heelis.</i>                         |                                          |

*Kenyon* took the doctrine to be perfectly clear; and it is not possible to state a stronger judicial opinion than Lord *Loughborough* expressed, that the lien does exist; though it is not a decision. In *Smith v. Hibbard* (1) it was insisted, that the delivery of possession upon payment of a small part of the money, was evidence, that he meant to trust to the personal security: but it was held clear, that the money contracted to be paid, was a specific lien upon the premises. The contract for payment of the money is itself in a sense of security full as good as a note. I do not state, as an authority, what appears upon this subject in *Austen v. Halsey* (2): as it is a mere *dictum*: and, a *dictum* that fell from me: but, endeavouring to state this doctrine as accurately, as I could, I see, I expressed it in these words (3): “that the vendor has a lien for the purchase-money, “while the estate is in the hands of the vendee: I “except the case, where upon the contract evidently “that lien by implication was not intended to be re- “served.”

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In the case of *Elliott v. Edwards* (3) this is the doctrine of Lord *Alvanley*; a very experienced Judge in Equity; with reference to whom I may say, his judgment will be read, and valued, as producing great information and instruction to those, who may practise in Courts of Equity in future times. He there states, that, if a man, having purchased an estate, conveys it, before the purchase-money has been paid, a Court of Equity will compel the person, to whom the estate was conveyed, to pay that money: provided he knew at the time he took the conveyance, that it had not been paid.

The

(1) 2 *Dick.* 730.

(4) 3 *Bos. & Pul.* 181; see

(2) *Ante*, Vol. VI, 475. 183.

(3) *Ante*, Vol. VI, 483.

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v.  
SYMMONS.

The next case in Equity is *Nairn v. Prowse* (5), before the *Master of the Rolls*; in which it was contended, that there was no lien; the vendor had taken a security for the money, payable at a future time; and during the interval the vendee might have sold the stock. The *Master of the Rolls* in his judgment, admitting the general doctrine as to the vendor's lien, observes upon the question, whether a security taken will be a waiver, that by conveying the estate without payment a degree of credit is given to the vendee; which may be given upon the confidence of the existence of such lien; and it may be argued, that taking a note or a bond cannot materially vary the case: a credit is still given to him; and may be given from the same motive: not to supersede the lien; but for the purpose of ascertaining the debt, and countervailing the receipt, indorsed upon the conveyance. There is great difficulty to conceive, how it should have been reasoned almost in any case, that the circumstance of taking a security was evidence, that the lien was given up; as in most cases there is a contract under seal for payment of the money. The *Master of the Rolls*, having before observed, that there may be a security, which will have the effect of a waiver, proceeds to express his opinion, that, if the security be totally distinct and independent, it will then become a case of substitution for the lien, instead of a credit given on account of the lien; meaning, that, not a security, but the nature of the security, may amount to satisfactory evidence, that a lien was not intended to be reserved; and puts the case of a mortgage of another estate, or any other pledge; as evidence of an intention, that the estate sold shall remain free and unincumbered. It must not however be understood, that a mortgage taken is to be considered as a conclusive ground for the inference, that a lien was not intended;

(5) *Ante*, Vol. VI, 752.

intended; as I could put many instances, that a mortgage of another estate for the purchase-money would not be decisive evidence of an intention to give up the lien; though in the ordinary case a man has always greater security for his money, upon a mortgage, than value for his money upon a purchase; and the question must be, whether under the circumstances of that particular case, attending to the worth of that very mortgage, the inference arises. In the instance of a pledge of stock does it necessarily follow, that the vendor, consulting the convenience of the purchaser by permitting him to have the chance of the benefit, therefore gives up the lien, which he has? Under all the circumstances of that case the judgment of the *Master of the Rolls* was satisfied, that the conclusion did follow; but the doctrine as to taking a mortgage, or a pledge, would be carried too far, if it is understood, as applicable to all cases, that a man, taking one pledge, therefore necessarily gives up another; which must, I think, be laid down upon the circumstances of each case, rather than universally.

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v.  
SYMMONS.

In the case of *Hughes v. Kearney* (6) Lord *Redesdale* states the doctrine; and the proposition is, not merely that the vendor might have security, but that he relied upon it; and a note or bills are considered, not as a security, but as a mode of payment.

From all these authorities the inference is, first, that, generally speaking, there is such a lien; secondly, that in those general cases, in which there would be the lien, as as between vendor and vendee, the vendor will have the lien against a third person; who had notice, that the money was not paid. Those two points seem to be clearly settled. I do not hesitate to say, that, if I had found

(6) 1 Sch. & Lef. 132.

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Conveyance to  
B. of an estate,  
the money be-  
ing paid by A.,  
B. is a trus-  
tee; and C.  
taking from B.  
with notice.

found no authority, that the lien would attach upon a third person, having notice, I should have had no difficulty in deciding that upon principle; as I cannot perceive the difference between this species of lien and other Equities; by which third persons, having notice, are bound. In the case of a conveyance to B., the money being paid by A., B. is a trustee; and C. taking from him, and having notice of the payment by A., would also be a trustee; and many other instances may be put. The more modern authorities upon this subject have brought it to this inconvenient state; that the question is not a dry question upon the fact, whether a security was taken; but it depends upon the circumstances of each case, whether the Court is to infer, that the lien was intended to be reserved; or that credit was given, and exclusively given, to the person, from whom the other security was taken.

In this case, having, as other Judges have had, to determine this question of intention upon circumstances, I may mistake the fair result of the circumstances, which I have endeavoured to collect. I must say, I have felt from the first, that there is upon the part of the Plaintiff that natural Justice and Equity, which excite a wish, that I could enforce the lien throughout: but, first, as to the annuities, I am persuaded, that, with reference to that part of the case, involving the question of lien as to the consideration, or any part of it, or any sum of money, the *quantum* of which is to be estimated with reference to the present value, or the past, or future payments, this is a case, in which the Plaintiff intended to rely entirely upon the personal security: the bond for 20,000*l.*; and that was the conception of *Martindale* also; by whose default of payment therefore the estate is not now subject to the lien in respect of the consideration of the annuities, or any allowance in respect of

of it. See, how it stands. In 1790 the Plaintiff, as principal, and *Martindale*, as surety, being engaged in an obligation, which I understand to be a personal one, for these annuities, agree to change situations: *Martindale* to be the principal, and the Plaintiff to be surety; in consideration of which the Plaintiff agrees to give 9000*l.*, secured by a mortgage. It rests upon that until 1793; when the transaction takes this course; that *Martindale* shall be, no longer a mortgagee, but owner of the reversion in fee; and, which is material, of the reversion, expectant upon the Plaintiff's life-estate. The annuities remain upon the old footing: that is, some payments were made, or arrears accrued, between 1792 and 1793; and payments were to arise from time to time. The value, given to *Martindale* in 1792 by the mortgage of 9000*l.* for taking the liability upon himself, was a value, which merely by the lapse of time between 1792 and 1793 must have varied. If the annuities had been paid, there must have been a difference in the estimation: also *de Anno in Annum* the value was decreasing; not only, as the annuities were wearing out; but also as the number of the annuitants was decreasing by death. It is impossible, it is not natural, to suppose, that parties, dealing for the consideration of annuities, and the purchase of a reversion, which might not take effect in possession, until all the annuitants were dead, relied on that reversion, as security in addition to the indemnity by the bond for 20,000*l.*: in the original transaction the estate being pledged for the sum of 9000*l.*, as if actually paid.

Then, as to the lien, for what is it? Is it for the original sum? That it cannot in justice be. Is it for future payments; that, one sum being paid, it does not attach: another sum not being paid, it does attach: a charge upon the reversion arising from time to time, accordingly as these payments are, or are not, made; and is that inference

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inference to be drawn, where a conveyance was executed without the least notice of such an intention; a security taken, not of itself sufficient to exclude the purpose of such a lien; but the nature of the subject, connected with the fact of that security taken, is decisive proof against such an intention; and it appears accordingly in the other cause, *Symmons v. Rankin*, that *Mackreth* and *Martindale* joined in the conveyance to *Coutts*, to secure an annuity of 2000*l.*, without the least reference to such an intention.

I admit, that the opinion of Lord *Loughborough* (7), that the case (8) before Lord *Camden* went upon the ground of lien, is an authority very considerably against my opinion; and I cannot say, upon what the case did proceed, if not upon that ground; as, the estate, given by the wife to her husband for his life, after her own death, if not affected by the lien, could not be bound to pay the annuity. If that case is accurately represented, Lord *Camden's* opinion seems to have been, that the mere circumstance of an estate given in consideration of an annuity, with a bond, would not prevent the lien attaching from time to time; and, so understanding it, I cannot bring my mind to the conclusion, that it is an authority, which ought to lead me to determine, that with reference to these annuities there is a lien, either for the original value, the present value, or the future payments, which may, or may not, become due.

As to the other part of the case, I have considered long, whether the conclusion is just, that, not meaning to have a lien, as I think this party did not, with regard to the annuities, he should mean to have a lien as to the
 sum

(7) See *Blackburn v. Greg-*
son, 1 Bro. C. C. 420.

(8) *Tardiff v. Scrughan*;
 stated 1 Bro. C. C. 423.

sum of money, due to *Manners*. My individual opinion is, that the intention was the same as to both: but with regard to the latter the cases authorize the lien; unless it is destroyed by particular circumstances; which do not exist here. That sum is precisely in the condition of a part of the consideration, not paid; and then the inference in equity, unless there are strong circumstances, getting over it, is, that a lien was intended. This comes very near the doctrine of Sir *Thomas Clarke* (9); which is very sensible; that, where the conveyance, or the payment, has been made by surprise, there shall be a lien. This Plaintiff understood at the time of the conveyance, that this money was to be paid on his account to *Manners*; which is the same, as if it was to have been paid to himself; and was not paid; and then the only question is, whether, as from the special circumstances as to the value and nature of the annuities I am to infer, that a lien was not intended as to them, I must make the same inference with respect to this gross sum; as to which, if the annuities were not mixed with the transaction, the doctrine of equity is, that the lien would attach. As to that sum my judgment is, that the Plaintiff has a lien.

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Lien, where either conveyance, or payment, was by surprise.

It is contended, that there are other circumstances in this case; that the Defendant *Symmons* has a conveyance of the estate without notice: or rather, a contract; as he had notice at the time of the conveyance. It is not necessary to go into the doctrine as to the effect of notice at the time of the contract, or at the time of payment of the money; though there is no doubt, the Defendant, when he took his conveyance, had notice from the recitals in his title-deed of *Mackreth's* rights and *Martindale's* obligations, as vendor and vendee. Neither is it necessary to go into the consideration of another argument;

(9) 1 *Black.* 150, *Burgess v. Wheate*.

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v.

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Distinction between a judgment, as attaching upon the land, and a special agreement for a security upon the land.

Rule between equities: "*Qui prior est tempore potior est jure.*"

argument; that the Defendant's money was not originally lent upon the faith of the land. There is a great difference between the effect of a judgment, as attaching upon the land, and a special agreement by a creditor for a security upon the land. It is not however necessary to determine such questions; as neither the Plaintiff, nor the Defendant *Symmons*, has the legal estate; which appears in the other cause *Symmons v. Rankin*, to be in *Coutts*, under the conveyance of 1793; in which *Martindale* and *Mackreth* joined; and then between equities the rule "*Qui prior est tempore potior est jure*," applies.

The result of this case is, that the Bill must be dismissed as it regards the annuities; and is right as to the other part of the claim; and, being right in one point, and wrong in the other, the Decree must be without costs.

1809.

Jan. 24th.

This case was mentioned by way of Motion to vary the minutes, upon a misunderstanding as to the costs.

The Lord CHANCELLOR, having repeated the ground, upon which no costs were given, made the following additional observations:

Since the judgment was pronounced, I have met with a case, which was not cited in the argument, but is referred to in Mr. *Sugden's* work (10); which seems to me to be a book of considerable merit; in which this subject is

(10) See *Sugden's Law of Vendors and Purchasers*, 352, &c. 2d edit.; 459, &c. 5th edit. The case alluded to by the Lord Chancellor, appears to be *Comer v. Walkley*: stated, 356, 2d edit.; 466, 5th edit. from the *Register's Book*.

is considered with much attention; and he comes to a conclusion, different from mine. I looked into the *Register's* Book for that case; the name of which I do not recollect; and it does seem to me, that his inference is not the necessary inference, arising from the circumstances of that case; as I find it in the *Register's* Book. I mention this to shew, that I have not withdrawn from the opinion I have expressed upon this subject; as to which, conceiving it to be of great importance, I should, if convinced, be very ready to retract: but, having endeavoured to collect all the doctrine of the Court upon it, I am sure I am right in that. I wish I was as sure in the application of the evidence.

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BELL, *Ex parte*.

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An under-
writer, merely
in that character,
cannot be
a bankrupt.
(See note (19)
post, 358.)

IN this Petition, in bankruptcy, which stood for judgment, the only question was, whether a Commission of Bankruptcy against a person, merely as an underwriter, could be maintained. The bankrupt was not engaged in any other business.

Sir *Samuel Romilly*, in support of the Petition:
Mr. *William Agar*, against it.

The Lord CHANCELLOR.

I have stated to the two Judges *Lawrence* and *Le Blanc* all the particulars of the argument, submitted to me upon this question; which have been, through Mr. Justice *Le Blanc*, submitted to the other Judges of the

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Court of King's Bench ; and they agree with the opinion, which I entertain ; that an underwriter, merely in that character, cannot be a bankrupt. The argument, that tends to make him so, is founded upon that passage of the Statute (11), which describes, as objects of the bankrupt laws, persons using " the trade of merchandize by way of bargaining, exchange, bartering, chevance, or otherwise, in gross, or by retail, or seeking his or her living by buying and selling, or that shall use the trade or profession of a scrivener, receiving other mens' monies or estates into his trust or custody." It is insisted, that underwriting is what Lord *Mansfield* in the case of *Hankey v. Jones* (12) terms, by a singular expression, a *Merchandizing Act* ; and it is compared to drawing and re-drawing bills of exchange : but it is clear, that Lord *Mansfield* would not have held, that drawing and re-drawing bills would alone make a man liable to the bankrupt laws, independent of the circumstance, in the case of *Richardson v. Bradshaw* (13), that *Wilson* held other mens' money ; and made profit of it.

The Statute (14) of *George I.* is then insisted on. The preamble of that Statute does not raise the inference. I may state, almost as an historical fact, that no such character as a mere underwriter, existed at that time ; and the policy of that act, appearing from the preamble, would be defeated, if an individual underwriter (15) engaged in any other business for the purpose of being a bankrupt. The inference, collected from some of the clauses, is not very conclusive against the fact, that there is no instance of a Commission against an underwriter, as such.

(11) See statute 21 *Jam. I.*
c. 19. s. 2.
(12) *Cowp.* 745.

(13) 1 *Atk.* 126.
(14) Statute 6 *Geo. I.* c. 18.
(15) See the Statute, s. 12.

such. Before that Act, the Statute of *Charles II.* (16) declared, not only that members of the *East India* and other companies shall not be capable of being bankrupts, but that the law was so before; and it is very remarkable; stating, that the members of those public companies did not receive dividends; as they now do; but received specific portions of the goods, imported from foreign countries; and sold individually their specific portions of those goods, so received: a state of circumstances, upon which it was very difficult to say, those persons were not liable to the Bankrupt Laws: but the Act recites the judgment of the Court of King's Bench in *Wolstenholme's Case*; and, not merely vacating the judgment, declares it to be contrary to law (17).

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BELL,

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Holders of Stock in Public Companies not liable to the Bankrupt Law in that character merely.

Another clause of the Statute of *George I.* (18) declares, that it shall not prevent carrying on trade in partnership except as to insuring; which upon this petition was relied on as an acknowledgment, that the insurance of ships is a trade: but that goes too far; as it extends * also to lending money upon bottomry; by which alone a man cannot be liable to the Bankrupt Law.

[*358]

Upon

(16) Statute 13 & 14 Ch. II. c. 24.

(17) The Act (s. 5.), recites the judgment in the King's Bench; whereby Sir *John Wolstenholme*, Knt. an adventurer in the *East India* Company, was adjudged and found liable to a Commission of Bankruptcy "only for" and by reason of a share "he had in the joint stock of the said Company, and" "a pretended selling for money part of the return,

"which he had in specie for" "his said adventure." The Commission therefore appears to have been open to the objection of fraud. The Act however certainly treats the opinion, that persons, merely as having such Stock, and dealing by sale of the produce, returned in specie, were liable to be bankrupts, as without foundation in law.

(18) Stat. 6 Geo. I. c. 18. § 25.

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Upon the whole therefore, but principally upon the opinion of the four Judges, which is nearly the same as if the parties had the benefit of a case; my judgment is, that an underwriter, merely in that character, cannot be a bankrupt (19).

(19) By Statute 6 *Geo.* IV. c. 16. the Statute of *Ch.* II. is repealed; and persons insuring ships or their freight or other matters against perils of the sea shall be deemed traders liable to become bankrupt: but no member of, or subscriber to, any incorporated, commercial, or trading Companies, established by Charter or Act of Parliament, s. 1, 2.

1808.

Nov. 28th.

After Answer to a Bill of Discovery Motion to amend the Bill by adding a prayer for relief refused with costs.

BUTTERWORTH & BAILEY.

A MOTION has been made, as of course, by the Plaintiff, for liberty to amend the Bill, which was a Bill for Discovery only, in aid of an action of ejectment, by adding a prayer for relief.

The Motion was made after Answer; and the *Lord Chancellor* expressing considerable doubt, it stood over, that precedents might be searched: but none were found.

Mr. *Bell*, in support of the Motion.

Under the usual Motion for liberty to amend the Bill no inquiry is made, whether it is for discovery or relief. The Order is drawn up; and the amendment is left to the discretion of Counsel. The circumstance, that no Order upon the subject can be found, is decisive upon the practice; as it is scarcely possible, that this Order should not have been frequently made; and there is no instance of discharging such an Order as irregular: the only way, in which it could come before the Court. Your Lordship suggested.

suggested the difficulty, that if the Bill prays both discovery and relief, when the Plaintiff is entitled to discovery only, a demurrer lies (20): but the practice, proposed by the Plaintiff, will place him in a worse situation, than he would otherwise stand in; as the Defendant, having the costs of the discovery, would not be prevented from demurring to the relief. Another objection, that the answer may be framed in a different manner, accordingly as it is to be read at law, or in this Court, is not conclusive. If it is understood as the rule, that the Plaintiff may amend by adding a prayer for relief, the answer will be prepared with a view to the practice, so understood, rather than to the exact statement of the case by the Bill, as originally framed. On the other side, considerable inconvenience may occur. It may frequently happen, that a Plaintiff, seeking a discovery for the purpose of an action at law, may conceive, that he has a good case: but it may turn out, that his remedy is in this jurisdiction: or at least, that some preparatory steps in this Court are necessary: if, for instance, it appears by the Answer to a Bill for a Discovery, to support an ejectment, that the Defendant is a mortgagee, liable to be redeemed by the Plaintiff, would not amendment, introducing that fact, offering to pay what should be due, and adding a prayer for redemption, be permitted? So, if it appeared, that the Plaintiff had a good title at law, but there was outstanding terms, would not the Court permit him by amendment to add to the Bill for Discovery a prayer to remove them? In many other cases it may be necessary to add a prayer for relief. The Answer to a Bill for Discovery of transactions, which were the subject of an application to a Court of Law, might shew circumstances, requiring a Bill for an account.

What

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(20) Ante, *Gordon v. Simpson*, Vol. XI, 509. *Baker v. Mellish*, X, 544; and see the note, 553.

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What disadvantage can arise from permitting the amendment in such cases? Abuse of the practice is not likely to occur; as the Plaintiff must pay the costs; and would therefore, if aware of the circumstances, insert the prayer for relief in the first instance.

Mr. *William Agar*, for the Defendant.

There is no instance of an application for liberty to amend a Bill of Discovery merely by adding a prayer for relief; making no amendment as to the discovery; and the inconvenience of admitting such a practice would be very considerable. The Defendant, who might, if the relief had been upon the record in the first instance, have put in a general Demurrer, may find a difficulty in demurring partially, so that the Demurrer shall not be over-ruled by the answer, which is to be taken as part of the defence. The Court, permitting the Plaintiff to add relief, must allow the Defendant to amend his answer *in toto*; which may require alteration altogether. The course of proceeding in this Court as to reading the answer, is very different from that of a Court of law: where it is sufficient, if the fact appears in any part of the answer; but here the party, reading one part of the answer, may stop: it is necessary therefore to state the same fact repeatedly; as it may be necessary to qualify it by admission, &c. As no precedent can be produced, some considerable degree of convenience ought to be made out, to induce the Court to do that, which was never done: at least it should be shewn, that it will not be attended with hazard; and the Court would expect, instead of this general application, that the proposed amendment should be particularly stated. It is not easy to say, in what way a defence against a prayer of relief could be framed: whether by Demurrer, or by a separate and distinct answer to that part of the Bill. All this is material

material to the point of inconvenience. The Order of Lord *Rosslyn* (21), imposing restraints upon the answer to an amended Bill, produces great vexation: a short original Bill being filed, with the view of introducing all the rest in the shape of Amendment, and pressing the Defendant to answer a completely novel case without sufficient time. A Bill of Discovery is upon payment of the costs considered, if not as dismissed, at least as brought to a conclusion. The Defendant confines himself to answering the interrogatories: the supposed cases therefore of the mortgage, or account, could not arise; unless the bill contained some charge, leading to it. The Court is called upon to make a precedent, which will be immediately followed in every case of doubtful relief by filing a Bill of Discovery: every principle of justice requiring, that the relief should be stated in the first instance. The necessity of answering Bills is already sufficiently harassing; and the costs are not by any means a remuneration.

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Mr. *Bell*, in Reply, said, nothing more was necessary than to add a prayer for relief; and the Defendant might put in a new answer in any way he should think proper.

The Lord CHANCELLOR.

When this motion was originally made, I had no recollection of any such fact as the amendment of a Bill of Discovery; making it a Bill for Relief; and if a precedent could have been produced, I should have considered it a much better guide, than any reasoning of my own upon it can be. If this is a motion of course, the state of the practice is very singular; that the Plaintiff in a Bill for

Plaintiff in a
Bill for Dis-
covery pays
the costs.

(21) General Order, 23d *January*, 1794, 4 *Bro. C. C.* 544.

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Bill, making it a Bill for Relief, he shall not pay the costs: but it is said, he is to pay the costs of the discovery. Can a single Order be found, taking the distinction between the costs, as costs, while the Bill stood upon the record as a Bill for Discovery, and the costs, after it had become a Bill for Relief: a distinction, that in some stage ought always to be taken? Does any person remember an instance of the costs, given before the amendment; or, when leave to amend was granted: or, when the amendment was made: or is there any decree, in which the Court takes notice, that the Bill had once been a Bill for Discovery: and afterwards became a Bill for Relief; giving the costs distributively between the Plaintiff and the Defendant, according to the nature of the case from time to time. I do not recollect any such instance.

Distinction as
 to an Answer
 to a Bill of
 Discovery,
 read as evi-
 dence at law:
 the whole must
 be before the
 Jury.

There is, it seems, a very faint memory, that this point was in discussion before Lord *Rosslyn*: but what was the decision upon it I cannot collect. If it was in favour of this application, the practice must have been repeated weekly since: nor do I think, the observation I made, with regard to the situation of a Defendant, who has answered a Bill of Discovery, which is afterwards made a Bill for Relief, has been displaced. The answer to a mere Bill of Discovery cannot be read here for any purpose: if read at Law, it is read as evidence; and the whole answer must be laid before the Jury (22): but if it is converted into a Bill for Relief, though merely by the addition of a prayer for relief, it is admitted, that the Defendant is entitled to put in a new answer. If then he acts honestly, the truth, that is apparent upon both answers, ought to be the same: but there are very different ways of telling the same truth; and, if the Plaintiff thinks proper to read the first answer, and brings a new Bill, he must

(22) *Lady Ormond v. Hutchinson*, ante, Vol. XIII, 47.

must read that first answer as evidence, not in that cause, but in another cause. Also, if the Plaintiff has his choice, whether he will begin with a Bill for Discovery, or for Relief, some remarkable degree of convenience ought to appear, before the Court would agree to change the practice. There may be cases, it is true, where the answer might furnish ground for supposing, that the relief was in Equity, not in Law: but that must be the subject of a special application; not a motion of course; and then I should be disposed to infer from the whole course of practice, that even in those special cases it would be better to direct the Plaintiff to pay the costs, and bring a new Bill; and if in that cause any use is to be made of the discovery, given by the first answer, to let it be read as an answer to a Bill of Discovery; as evidence: not as part of the defence, or admission, upon which the Bill proceeds.

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The Motion was refused with costs (23).

(23) *Jackson v. Strong, v. Lord Clinton*, 2 Ves. & Bea. 13 Pri. 494. Motion after 113. As to Defendant's right Answer, to amend by striking to costs on a full Answer to a out the prayer for relief, re- Bill of Discovery, see *Coven- fused: Earl of Cholmondeley try v. Bentley*, 3 Mer. 677.

FREEMANTLE v. TAYLOR.

ROLLS,
1808.
Dec. 1st.

STEPHEN FREEMANTLE by his Will, dated the 16th of September, 1793, reciting, that he had 4000 guineas to dispose of, bequeathed to his son *John Freemantle* the sum of 2000*l. British*: and the remainder to be divided between his two girls: "in case of any of their deaths
" the
bequest of the capital in terms limited to those living at the date of the Will,
A direction for maintenance, in general terms, comprehending all children, not restrained by the

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" the proportion occasioned by such death to be divided " equally between the survivors." He left the interest of the whole fund to his wife, to be by her applied for the benefit and education of his children; " until the girls " shall be married or arrive at the age of twenty-one " at which period they are to be independent as far as " that sum goes;" with a power to lay out a proportion of the 2000*l.* for the advantage of his son previous to his arriving at the age of twenty-one; at which time it is to be at his own disposal. The testator afterwards declared, that he meant, that his wife should receive the benefit of the interest of the 4000 guineas for her own use entirely until Mrs. *Molloy's* death: and then according to the terms specified on the other side: viz. " for " the advantage and education of my children trusting " entirely to her honor and affection for her children;" directing, that she may not be brought to account for the expenditure of the interest in case of his death; and that a bond debt should be paid out of the 4000 guineas " as " it is to be taken in equal parts according to the proportions as specified upon the other side."

The testator's widow married again; having upon the death of Mrs. *Molloy* succeeded to the appointment of Housekeeper to the House of Lords of *Ireland*, under a grant of the reversion of that office; which upon the Union with *Ireland* was converted into a pension.

A petition was presented by the three children of the testator, who were living at the date of the Will; praying maintenance; and submitting the question, whether another daughter, born after the date of the Will, was entitled to maintenance. Another petition was presented on behalf of that daughter.

Mr.

Mr. *Wetherell*, in support of the Petition of the three eldest children: Sir *Samuel Romilly*, for the youngest daughter. The case of *Matchwick v. Cock* (24) was cited.

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FREEMANTLE
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The MASTER of the ROLLS, upon the authority of that case, made the Order for maintenance upon both Petitions.

(24) Ante, Vol. III, 609.

SWAINE v. BURTON.

1808.
Dec. 8th.

MARY COCKELL by her Will, dated the 30th of September, 1776, gave and devised to *Charles Knowlton* and *Charles Booth*, their heirs, executors, administrators, and assigns, all her leasehold, freehold, and copyhold, messuages, lands, tenements, hereditaments, and real estates whatsoever, in *Methley* and other places mentioned, in the counties of *York*, *Cumberland*, and *Westmorland*, or elsewhere in *Great Britain*; to hold the same unto and to the use of the said *Charles Knowlton* and *Charles Booth*, their heirs, executors, and administrators, according to the respective natures and tenures thereof; upon trust to sell the same; and with the money, arising

Devise and bequest of leasehold, freehold, and copyhold, estates to trustees, their heirs, executors, &c.; upon trust to sell; and pay debts, &c.; and after payment thereof to pay and apply the rents, &c. to A. for

life; and after his decease devising and bequeathing to the heir or heirs at law of *B.* and the heirs, executors, &c. of such heir or heirs; to whom the trustees were directed to convey and assign accordingly.

Co-heiresses of *B.* being also the co-heiresses of the devisor, take, not as co-parceners, by descent, but as joint tenants, by purchase; and therefore subject to survivorship.

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v.

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arising therefrom, to pay off and discharge all mortgages and incumbrances, affecting the said estates, and also her just debts and funeral expences, and likewise the annuity and legacies and sums of money, after given and bequeathed; and upon farther trust, after payment thereof to pay and apply the clear rents and profits of the said estates, or so much thereof as should not have been sold for the purposes aforesaid, unto and to the use of *Joseph Welch* during his life; and after his decease the testatrix gave, devised, and bequeathed, all such part of her real estates and the produce thereof as should not have been sold, paid, or applied, for the purposes aforesaid, unto the heir or heirs at law of her cousin *William Cockell*, then late of *London*, barber-surgeon, deceased, and the heirs, executors, or administrators, of such heir or heirs at law; and she directed her said trustees and the survivor of them, his heirs, executors, and administrators, to convey and assign all the remaining part of her said real estates unto the said heir or heirs of her said cousin *William Cockell* accordingly. She appointed *Welch* her executor.

The testatrix died in 1777. *Welch* died in 1789. The Master's Report, under an inquiry, directed upon a Bill, filed by *Susannah Burton*, a legatee, claiming also as one of the co-heiresses at law of *William Cockell*, to have the Will established, stated, that the Plaintiff in that cause *Susannah Burton*, and *Eleanor Sampson*, *Ann Hutchinson*, *Mary Hargreaves*, and *Catherine Swaine*, were the co-heiresses at law of the testatrix, and also co-heiresses of *William Cockell* at the time of the testatrix's death; and in 1798 a Decree was made at the *Rolls*; declaring, that those persons, the Plaintiff and the Defendants in that cause, as the co-heiresses of *William Cockell*, were entitled; and it was ordered, that all proper parties should join in conveying to them; &c.

On

On the 22d of *July*, 1797, *Catherine Swaine* died, intestate; and the Bill was filed by her eldest son and heir at law: claiming one fifth part of the estates in right of his mother, as one of the co-heiresses of *William Cockell*. The Defendants, the surviving co-heiresses, and purchasers under them, insisted upon their title, as joint-tenants, having survived *Catherine Swaine*.

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v.
BURTON.

Mr. *Johnson* and Mr. *Wear*, for the Plaintiff.

If the question, raised by the Defendants, whether the estate and interest, given by this Will, is a joint tenancy, or a tenancy in common, can be considered open, the construction ought to be, that it is a tenancy in common. The persons, named in the Master's Report, were the co-heiresses, not only of *Cockell*, but of the testatrix also. They take as co-parceners, not as joint-tenants; unless they have an interest, different from that, which would have descended to them, as co-parceners. A testator may certainly devise so as to prevent the descent, and create a joint tenancy; though the devisees should happen to be his heirs at law; as in the case of a devise to co-heiresses at law and their heirs (25): but this is not that simple case. This testatrix, uninformed, whether one person or more would be the heir of *Cockell*, to make her devise certain, devises, if there should be one, to him and his heirs; if more than one, to them and their heirs; not meaning, in the latter event, that they should take as joint-tenants; which was the obvious intention in the case in *Croke* (25); but merely guarding against the possibility, that there might be more than one heir. Before the Statute of Fraudulent Devises (26) a Court of Equity would not have made a construction upon such a devise, which

(25) *Anon. Cro. Eliz.* 431.

(26) Statute 3 & 4 *Will. & Mary*, c. 14.

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which would have had the effect of depriving the specialty creditors of their lien upon the estate descending. The result of the authorities is, that under a devise to the person, who shall be the heir of the testator at his death, whether by name or description, and of the same estate and interest, that would descend to him, he shall take by descent: *Clerk v. Smith* (27), *Emerson v. Inchbird* (28). The general inclination of the Courts now is towards a tenancy in common.

Mr. *Martin* and Mr. *Parker*, for the Defendants.

This is a clear joint tenancy; and consequently the estate of Mrs. *Swaine* survived: no act of severance having taken place. The legal estate is given to trustees; upon trust to pay the debts and legacies; and, subject thereto, to the use of *Welch* for life; and, after his decease, to the heir or heirs of *Cockell*, and the heirs, executors, &c. of such heirs; and the trustees are directed to convey to the said heir or heirs. The Court will give effect to those latter words; declaring the trust to convey to the persons, thus described; according to which a conveyance would have been directed by this Court. It is true, there is an inclination against a joint tenancy: but, to prevent that, the legal effect of the words, something pointing to a tenancy in common must appear; *Jolliffe v. East* (29).

The opinion of Lord *Holt* in the case of *Fisher v. Wigg* (30) in favour of a joint tenancy, upon the words "equally to be divided," in opposition to the other Judges, has certainly been over-ruled by Lord *Hardwicke*  
 in

(27) 1 *Salk.* 241.

(29) 3 *Bro. C. C.* 25.

(28) 1 *Lord Raym.* 728.

(30) 1 *P. Will.* 14.

*Hob.* 30.

in *Rigden v. Vallier* (81): who, however, had considerable doubt even on those words, in an instrument, partaking of the nature both of a Deed and a Will; and determined upon the circumstance, that it was a provision by a father; who must be supposed to intend an available, not a contingent, provision. In those cases, that have turned upon the words "respectively, equally," &c. the decision has always proceeded upon something, supposed to point at a tenancy in common: yet it may be observed upon the word "*equally*," that the chance of surviving puts them all upon an equality. Even a bequest of the residue of personal estate to several persons was, in *Webster v. Webster* (32), *Cray v. Willis* (33), where the residuary legatees were also executors, and *Campbell v. Campbell* (34), held a joint tenancy; though it was strongly urged, that the Civil Law knew nothing of joint tenancy. This testatrix had not in contemplation, that the persons, whom she described as the heirs at law of *Cockell*, would be her own heirs. Under this devise they must qualify as heirs to him, not to her; and must therefore take by purchase, not by descent. There is a case (35), adjudged, whether satisfactory or not, that even under a direct devise to the right heirs of the testator, being several, they would take by purchase, not by descent: but this is a devise to persons, whom the testatrix did not contemplate as her heirs.

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*The Lord CHANCELLOR.*

The effect of this devise is to break the descent; vesting the estates in trustees; and directing them to convey to the persons described, as purchasers.

The

(31) 2 *Ves.* 252; see 257.

(34) 4 *Bro. C. C.* 15.

(32) 2 *P. Will.* 347.

(35) *Anon. Cro. Eliz.* 431.

(33) 2 *P. Will.* 529.



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 v.  
 BURTON.

The first question is, whether this point was decided in the former suit; as it is contended by the Plaintiff, that the reference to the Master to inquire and state, who were the heirs of *William Cockell*, and, if any were dead, the heirs and representatives of each of them, has decided, that the Court must have held this an estate in co-parcenary. The utmost effect of that direction is this: if the personal representatives would have taken the produce, that arose between the deaths of *Welch* and any of the co-heiresses, it was fit, that those representatives should be before the Court; and as to the heirs, the Court would not determine the question in the absence of the heirs. The case is therefore entirely open; except as the direction of that inquiry for the heirs may be considered as an intimation, that the Court would not decide the point in their absence. As to a severance in equity, if this was a joint tenancy, these proceedings have not made an equitable severance; but have left the title just where it was. I do not lay much stress upon the language of the Order; the import of which, that they are entitled as co-heiresses, not of the testatrix, but of *Cockell*, is rather against co-parcenary. That however might have slipped in.

Then, where the legal descent is by the devise to trustees broken, does the direction to convey to persons, not in the character of heirs of the testatrix, but who happen to be so, make them take by descent; as they cannot take in law? The descent being broken, the intention can be inferred from nothing except the fact, that these persons were heirs at law, known or unknown. The case of *Cray v. Willis* (36) is a clear authority, that such words, used as to personal estate, would create a joint

♥ (36) 2 *P. Will.* 529. *Jackson v. Jackson*, ante Vol. VII, 535. IX, 591; see the cases referred to, 597, note.

joint tenancy; notwithstanding what has been said in the Ecclesiastical Courts. Then does it depend upon the intention of the testatrix? If the circumstance, that words of joint tenancy are used, shews an intention, that the devisees shall take by purchase, I must, even if these persons were the daughters of the testatrix herself, who, happening to be her heirs, would have taken by purchase, not by descent, as not taking an estate of the same nature, have collected the intention from the whole of the Will. This is, not merely a devise of freehold estate, but a disposition of leasehold, freehold, and copyhold, lands. There is no doubt, that the leasehold estate in equity would be taken by them, as purchasers. The devise also is, not to these heirs, but to trustees; and by that devise the descent is broken. Those trustees are to have for certain purposes the management of the legal estate. Even during *Welch's* life it is very doubtful, whether there was not a legal estate in them. I think, there was: the direction being, not to permit him to receive, but to pay and apply the rents and profits; and after his death to convey to these heirs; who are to take at law as purchasers: viz. by conveyance from those persons, who interrupted the descent. Farther, it is impossible, that she could mean, that these persons should take as her heirs, and, if the devise had been to her heirs, their heirs and assigns, as in the case in *Croke* (37), would that be stronger evidence of an intention, that they should take a different estate from that, which would pass by descent, than the fact, that she has given these estates to them, not as her heirs, but as the heirs of another person. The conclusion is, that this is an estate in joint tenancy; and therefore the equitable estate survived, just as the legal estate would have survived.

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v.

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Joint tenancy under a bequest of personal property to more than one, without words of severance.

Heir, being also devisee, takes by purchase, not by descent, if the devised estate is not of the same nature.

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The Bill was dismissed.

(37) *Anon. Cro. Eliz.* 431.

A A 2

1808.

Nov. 25th.

Dec. 6th, 12th.

Whether a Defendant can by Answer refuse to give a full Answer, *quære.*

ROWE v. TEED.

**T**HE Bill in this cause prayed an account of the produce of prizes, captured by the *Lord Nelson* privateer: the Plaintiff claiming, as part-owner, entitled to one-third. A plea having been over-ruled, one of the Defendants put in an answer; alleging various circumstances as to the title to the ship and her earnings; stating, that, though the Plaintiff had agreed with the former owner for the purchase of one-third, no bill of sale was executed; admitting however in another part of the answer, that the ship was registered in the names of the Plaintiff and the Defendants; stating, that the ship made several captures between the 14th of *January*, and the 12th of *June*, 1805, and afterwards; some of which were restored; that on the 12th of *June* the Plaintiff agreed to sell his share of the ship and prizes to the Defendant; and another person; in whose names a new registry was made; with various allegations as to the consideration, and other circumstances, attending that transaction; and, giving an account as to the prizes, captured between the 14th of *January* and the 12th of *June*, 1805, insisting, that he was not bound to set forth an account as to the period, during which the Plaintiff was not an owner.

The Master allowed Exceptions to the Answer; and an Exception to the Report was taken by the Defendant.

Mr. *Richards*, Mr. *Benyon*, and Mr. *Bell*, in support of the Exception to the Report.

[ 373 ]

There is no case upon this question, which has been

so much discussed (38), that resembles this precisely: this Plaintiff not stating by his Bill a complete title, without proving something more than he has alleged: the allegation being only sufficient to introduce the proof: but the Plaintiff does not state the fact, that a bill of sale was executed to him. The Defendant avers, that no bill of sale was executed to him; and then his title fails. The whole turning upon a single fact, the rule, according to Lord *Kenyon* in the case of *Gunn v. Prior* (39), applies; and it would be extraordinary, the whole turning upon a single fact, sworn to by the Defendant, if the Court should impose upon him the burthen of setting forth a long account; of which taking that fact to be true, no use can be made. The Plaintiff's title, as partner from *January to June*, 1805, is admitted; and in that period the account is set forth: the Defendant insisting, that from *June* the Plaintiff had no title. This case, arising upon a claim of partnership, resembles *Jacobs v. Goodman* (40). The case of a purchase for valuable consideration without notice is an admitted exception; in which case the inconvenience may not be by any means so considerable as in this. The question in this case is no less than this; whether any man upon the mere suggestion of a partnership may inquire into all the affairs of the first mercantile house in *London*. The Court, pressed with the weight of such an inconvenience, will follow the decisions, that a denial of title is an exception to the general rule.

1806.  
Rowe  
v.  
Teed.

Sir *Samuel Romilly* and Mr. *Johnson*, for the Plaintiff.

[ 374 ]

The Master's Report, that this answer is insufficient, is right; but the general question, upon which the decisions

(38) *Taylor v. Mitner, Dol-  
der v. Lord Huntingfield,  
Faulder v. Stuart, Shaw v.  
Ching*, ante, Vol. XI, 41,  
283, 296, 303.

(39) Stated ante, Vol. XI,  
90, 291.

(40) In the Court of Ex-  
chequer, 3 Bro. C. C. 487,  
note.

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Rowe  
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cisions are in opposition, does not arise: viz. whether the Bill seeking a discovery of accounts or facts, to which the Plaintiff represents himself to be entitled, as standing in a certain relation to the Defendant, the latter, denying that relation, yet is bound to give the discovery. This case is not put upon a single point: the Defendant by a very long and complicated answer tendering several issues upon a variety of facts, perfectly distinct. The result is, that for a certain period the Plaintiff would be entitled to an account: then reasons are given for concluding, that nothing would be produced by that account: viz. that the prizes, taken during that period were restored; and then the Defendant states an equitable agreement by the Plaintiff to assign his share to the Defendant. All these facts are stated with great detail, and with a variety of circumstances. If any doubt could be entertained upon those cases, where the short point was, whether the Plaintiff was partner, or not, that circumstance is decisive against this Defendant. This answer cannot be considered in a more favorable light than a plea; and, if this had been put in the shape of a plea, it would have been over-ruled by the discovery, that is made.

*The Lord CHANCELLOR.*

One difficulty in this case is, that as this record stands, the Court must suppose it possible, that the Plaintiff will prove, that he was once an owner of this ship; and then there is nothing to take away his right: the Defendant stating nothing, that shews, he has acquired the title since *June*; the Plaintiff, if he ever had it, has not been deprived of it.

[ 375 ]

Another difficulty upon this point has always embarrassed me. The case of a Bill, stating a parol agreement for the purchase of an estate, with a part-performance, was under very singular circumstances; until it was settled

settled here (41), that the Defendant might take advantage of the Statute (42) by his answer, admitting the agreement. Until that was so settled, the answer admitting the agreement, it was immaterial, whether the acts, alleged to have been done in part-performance, were denied, or not; as the agreement, being admitted, must have been performed. If, on the other hand, the Defendant, answering as to the acts of part-performance, insisted, that he was not bound to answer, whether there was a parol agreement, or not, those acts would not do; unless there was an agreement, to which they could be referred. If then the Plaintiff could not extract from those acts of part-performance, what was the agreement, or obtain an admission of the agreement, what was to be done with the record in that state of circumstances? I never could get over that difficulty. There is a farther difficulty in this case; that the Plaintiff might at the hearing upon a full answer waive his right to an account; and claim the money, admitted to be due.

1808.

Rowe

v.

TENN.

Defendant to a Bill for specific performance of an agreement within the Statute of Frauds, may by Answer, admitting the agreement, take advantage of the Statute.

*The Lord CHANCELLOR.*

The answer, which has been put in to this Bill, is drawn with a view to meet the difficulty, that arises out of the various conflicting authorities, which are to be found upon this point. Various facts are stated; upon each of which issue might be taken; and the answer upon the whole amounts to this: a denial of the general allegation in the Bill, that the Plaintiff is a part-owner of this ship, under the alleged agreement for the purchase of a third share, by the averment, that no bill of sale was executed to him: the admitted fact of the registry in the names of the Plaintiff, the Defendant, and the

Dec. 21st.

[ \*376 ]

(41) See ante, *Cooth v. Jackson*, Vol. VI, 12, and the note, III, 38, 39, 40. (42) Statute 29 Char. II, c. 3.

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the other part-owner, that registry made upon their oaths, being utterly inconsistent with that allegation. Having however stated that one short fact, that no bill of sale was executed, without which the property could not pass, which fact, if proved to be true, would put an end to the suit, the answer does not stop there; and refuse the discovery and relief; but proceeds to consider the truth or falsehood of that allegation; as a fact, fairly put in issue in the cause; stating, that the ship made several captures between the 14th of *January* and the 12th of *June*, 1805; what became of some of the prizes; that after the 12th of *June* more prizes were condemned; and that some, captured before and since that time, were restored. The answer therefore does not consider that allegation, that no bill of sale was executed to the Plaintiff, as an allegation, that ought to preclude all farther discovery and the relief; treating it as no more than a single fact, put in issue. The answer then states, that the Plaintiff, who is represented as not being an owner, agreed upon the 12th of *June* to sell all his share of the ship and the prizes to the Defendant and another person; which according to the former part of the answer amounts to nothing in Law; as there is no averment here, that the owners had parted with the interest, by means, competent to divest it. The answer then states various circumstances as to that transaction of sale; which upon the face of the answer was incomplete.

[ \*377 ]

The question is, whether this is an answer, bringing forward such one short fact, or such a series of circumstances, establishing in the result one fact, that would \* be an answer to the prayer of discovery and relief; and therefore, whether this is a case, in which the Court should decide that point, which has been long the subject of litigation: to what extent a Defendant is bound to answer; who has averred a circumstance, which, if truly  
averred

averred in another form, and sufficiently proved, would be an answer to the whole prayer for discovery and relief. I repeat, that I should not shrink from the decision of that question; if it was fairly before me; and I should be relieved from the apprehension of an erroneous judgment by the reflection, that it is much better, that there should be a decision, than that such a point should remain in uncertainty. It is not my purpose on this occasion to repeat all, that is to be found upon this subject in the late cases (43); but I must repeat, that, whenever this question comes to a decision, it will be infinitely better to decide, that in this Court the objection should be made by plea, rather than by answer (44). In the Court of Exchequer exceptions come before the Court in the first instance. That is not the course here. The office of a plea, generally, is, not to deny the equity, but to bring forward a fact; which, if true, displaces it: not a single averment; as the averment in this answer that no bill of sale was executed; but perhaps a series of circumstances; forming in their combined result some one fact; which displaces the equity.

There is this difference between law and equity; that here for the sake of convenience, that is, of justice, the denial of some fact, alleged by the Bill, in some instances, with certain averments, has been considered sufficient

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Distinction as to Exceptions in the Courts of Chancery and Exchequer. Office of a Plea, generally, not to deny the Equity, but to bring forward a fact, the result perhaps of a combination of circumstances, which, if true, displaces the Equity.

(43) *Dolder v. Lord Huntingfield*, *Faulder v. Stuart*, *Shaw v. Ching*, ante, Vol. XI, 283, 296, 303.

(44) The question is decided accordingly in *Leonard v. Leonard*, 1 Ball & Beat. 320. *Somerville v. Mackay*,

post, Vol. XVI, 382. See the note, ante, I, 293. In the Exchequer, where Exceptions come immediately before the Court, the rule is the other way. *John v. Ducie*, 13 Pri. 632.

Distinction as to pleading between Law and Equity: the latter admitting the denial of some fact, alleged by the Bill, in some

instances, with certain averments, as a good plea.



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Excepted cases, where a party is not bound to answer a particular circumstance: viz. not to criminate himself: the case of a purchaser for valuable consideration.

sufficient to constitute a good plea (45); though not perhaps precisely within the definition of good pleading at law. If each case is to be considered upon its own circumstances, it is desirable, that this point should be brought before the Court by plea, rather than by answer; as an answer *prima facie* admits, that the Defendant cannot plead; and with the exception of the cases, in which it is settled, as general law, that the party is not to answer a particular circumstance, as, that he is not to criminate himself, the case of a purchaser for valuable consideration, &c. this Court does not trust the Master, generally, with the determination, how much of the Answer, considered as a plea, would be a good defence. The Master is therefore almost under the necessity of admitting an exception; and, when the propriety of his judgment comes to be argued here, it would be most incongruous, that the Court, admitting his judgment not to be wrong, should yet give a different judgment; considering the Answer as a plea.

Generally, the Bill and Answer should form a Record, upon which a complete Decree may be obtained.

Another circumstance, deserving attention, is the great difference of expence in bringing forward the objection by plea rather than by Answer. There is but one more material general observation to be added to those, which are to be found in the cases reported; that generally, admitting there are exceptions, the practice of this Court requires, that the Bill and the Answer should form a record, upon which a complete Decree may be made at the hearing. If, for instance, this Plaintiff is a part-owner of the ship, he has a right to an Answer, that will enable him, if a certain sum is admitted to be due, to obtain a Decree for that sum; if he is satisfied with that; and does not desire an account.

With

(45) *Newman v. Wallis*, 2 Bro. C. C. 143. See 3 Bro. C. C. 489.

With that general observation, in addition to those to be found in the other cases, I conclude, that this is not a case, in which I can say, there is one clear fact, or such a combination of facts, giving, as the result, one clear ground, upon which the whole equity of this Bill may be disposed of. First, it is very difficult upon this Answer to say, there is a positive affirmation, that there was no bill of sale. Next, it is argumentative: "you were not owner in *January*, 1805: but, least it should turn out, that you were, I give, to such an extent as I think convenient, the account of the ship's transactions up to *June*; at which time, if you were an owner before, you ceased to be so;" and that allegation, under which he limits the discovery, and refuses to treat the Plaintiff as owner after the 12th of *June*, 1805, is made upon a supposition, inconsistent with the statement, that accompanies it. Upon the whole this is a case, much too complicated upon the facts, stated in the answer, to form the case, in which I should pronounce that new doctrine, that is to settle the practice with reference to this point. As to the argument of convenience or inconvenience, which is to be found in these cases, this Defendant, considering what his transactions have been, has no great reason to complain of the inconvenience, if it should prove more considerable that upon the circumstances there is reason to apprehend, from making the farther discovery. I decide this case however, not upon the special circumstances, but upon the general ground, afforded by the Answer, taken altogether.

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 v.
 TEED.

The Exception to the Master's Report was accordingly over-ruled.

1808.

SHAW v. LINDSEY.

Dec. 12th, 13th.

Depositions, before publication suppressed; being taken by the Commissioners ready prepared: the witness being agent in the cause; and the mode, in which the Court receives the information, whether from the Commissioners, or otherwise, is not material.

The Commission directed to proceed for the purpose only of re-examining that witness; substituting another Commissioner for one,

who, having refused to qualify, was not permitted to be present at the examination. This Order not to prevent the Court's opening the depositions, if a case of necessity should arise; as, if the witness could not be again examined.

Depositions suppressed: the Commissioners having employed the clerk of one of the parties as their clerk.

A MOTION was made, by the Defendant, before publication in this cause, that depositions, taken by Commission, executed in *Scotland*, should be suppressed; as having been brought before the Commissioners ready prepared: the witness being also agent to the Plaintiff in the cause.

Sir *Arthur Piggott* and Mr. *Bell*, in support of the Motion, observed, that, if this can be done, there can be no check upon the examination of witnesses in this Court.

Sir *Samuel Romilly*, Mr. *Hart*, and Mr. *Cooke*, for the Plaintiff, opposed the Motion; distinguishing this, as merely the effect of the inadvertence of the Commissioners; not, as in the instance of depositions upon leading interrogatories, the fault of the party.

The Lord CHANCELLOR referred to a case, in which depositions were suppressed on the ground, that the Commissioners employed the clerk of one of the parties as their clerk (46); and inquiring, how depositions, ordered to be suppressed, are disposed of, was answered from

(46) *Wyatt's Prac. Reg.* 122; referring to 2 *Ch. Rep.* 393.

from the Bar, that the Clerk in Court indorses them; "*Suppressed;*" and they remain unopened.

1808.
SHAW
v.
LINDSEY.

The Lord CHANCELLOR.

There is every reason to believe, that these Commissioners, taking the examination of this witness, thought they were acting rightly; and, though I have no reason to think, the effect will be to produce any different testimony from the witness, yet I am bound to suppress the deposition. Upon general principles nothing is more clear, than that a witness before Commissioners cannot be examined in such a manner, that the effect is, not his testimony, given in answer to interrogatories, but, as it is termed, filing an affidavit. This witness is sworn to be the agent of the Plaintiff; which is a material circumstance; and, in whatever way the knowledge of the fact reaches the Court, whether from a Commissioner, (and I think, it is not incompetent to a Commissioner to disclose it), or even from an evesdropper, the Court, having knowledge of the fact, must act upon it. The question, whether the proper course is by suppressing the deposition, has been raised at the Bar.

Dec. 13/14.

All Courts of Justice are extremely anxious to secure the pure examination of witnesses by not permitting that mode of examination, which would lead to infinite mischief. Many instances have occurred of a witness, coming into Court, holding in his hand an answer, which he has conscientiously framed as his answer to interrogatories;

Witness cannot give, as his evidence, answers in writing, prepared

before the examination: nor is any suggestion to him by the attorney, counsel, or any other person, during the examination, permitted; and in Equity whenever such fact is disclosed, the deposition will be suppressed.

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with the substance of which he may be acquainted: the answer of an honest, conscientious, man; and the value of his testimony perhaps not diminished by his anxiety to be correct: yet Courts of Law and Equity, with the view of excluding general mischief, concur in refusing to allow it. The consequence would be, that the Attorney or Counsel would settle the deposition; and accordingly the habitual practice at law, upon an examination *vidæ voce*, is not to permit any suggestion to the witness by the Attorney, Counsel, or any other person. The same strictness prevails in this Court; where the extent of mischievous management, that would ensue, if a witness should be permitted to go before Commissioners with a prepared deposition, amounting in effect to an affidavit, is obvious. The Court therefore has always, whenever the fact was disclosed, thought it right, without attending to the particular circumstances, to suppress the deposition.

Deposition suppressed, and a re-examination directed; the deposition being taken from the witness, using during the examination full minutes in writing, which she stated to have been originally her

own, put into method by the attorney; and

There are two cases, that go rather pointedly to this: a case in *Ambler* (47); where a deposition, prepared by the Plaintiff's attorney, was suppressed; and *Ferry v. Fisher* (48). In that case the execution of the Commission began upon the 11th of *October*; and the Commissioners certified, that *Elizabeth Broderick*, a servant of the Plaintiff, being brought before them as a witness, immediately as she was sworn, produced, for the assistance of her memory, notes or minutes in writing, drawn partly in the style of a deposition; occupying nearly six sheets of paper: when questioned with respect to those minutes, she answered, that it was all her own handwriting; that, as things occurred to her memory, she had taken notes or minutes upon small pieces of paper; which

(47) *Anon. Amb.* 252.

(48) *MSS. Dec.* 3d, 1763.

so copied with some corrections by herself.

which she delivered to the Solicitor for the Plaintiff, merely to draw them into method; that he had not varied from her meaning; that she afterwards copied those minutes so drawn out; and made various alterations in her own hand-writing; in order to make it agreeable to her intention; that all, except the last sheet, was a copy of those minutes, so put into method by the attorney; and the last sheet was minuted and framed by herself without the assistance of any person. The Commissioners farther stated, that she insisted upon making use of those minutes; which they permitted; not conceiving, that they had authority to take them from her. She did accordingly use them, while giving her evidence; and being frequently asked, whether the said notes and minutes were true, she solemnly declared, that they were. An Order was made, that the deposition should be suppressed; without prejudice to the Plaintiff's examining her properly under the Commission, which was then in execution.

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SHAW
v.
LINDSEY.

Distinctly stating, that I have no doubt that this examination contains the truth, still it appears to be an examination ready framed by the witness; who was the agent in the cause. The proper Order, considering what I believe to be his intention, is, that the deposition shall be suppressed; and this Commission shall proceed for the purpose of examining him again properly; not to admit any other witness; which might be an after-thought.

It was then suggested, that one of the persons, named as a Commissioner by the Defendant, should not continue in the Commission; having upon the former occasion refused to qualify; on which account he was not permitted to remain in the room.

The

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The Lord CHANCELLOR said, clearly, if he would not qualify as a Commissioner, he could not be present during the examination: they were right therefore in not permitting that: the Defendant meant, that this person should be present, for the purpose, not of examining any witness, but of hearing what the witnesses would say, in order to give the Defendant information: another Commissioner must therefore be named.

His Lordship added, that, though the Court does give this sort of direction, if it should happen, that the witness could not be examined again, the objection does not go the length of preventing the Court's directing hereafter, that, the deposition may be opened; if necessity should require, that the rule should be dispensed with (49).

(49) Ante, *Sandford v. Paul*, Vol. I, 398, and the note, 400.

1808.

Dec. 12th, 13th.

Legacy of
" 5000*l.* ster-
" ling or
" 50,000 cur-
" rent ru-
" pees," after-
wards describ-
ed as " now
" vested in
the East India
Company's

GILLAUME v. ADDERLEY.

THE question in this cause arose upon a Will; by which the testator first bequeathed " the sum of " 3348*l.* 3*s.* 4*d.* sterling" to his father and mother and the survivor of them, for the term of his or her natural lives; " which said sum is in two bills drawn by the " presidency of *Fort William, Bengal*, one for the sum " of 1125*l.*: the other 2223*l.* 3*s.* 4*d.* being the account " of money paid into the treasury of *Fort William*, on " account bonds, and sometimes mentioned as " the said sum of 5000*l.* ster- " ling" held not specific, but general; as a demonstrative legacy: with a fund pointed out: a construction to be favoured for a natural child; as giving a provision in all events: the Will also giving one legacy, clearly specific, viz. the sum of 3348*l.* " which said sum is " in two bills " described as then laying for acceptance.

"account of the investment of 1782 and 3; which bills
"are now laying for acceptance at the *India House* in
"*London*."

1808.
GILLAUME
v.
ADDERLEY.

The testator then directed, that as soon as the said bills shall become due and payable from the Company, the aforesaid sum 3348*l.* 3*s.* 4*d.* be vested in some Bank or Government security in the name of his executor; in trust to pay interest to his father and mother and the survivor for their lives; and after their decease equally between the testator's brother and sister to be disposed of as they should think proper. The Will then proceeded thus:

"I also bequeath to my natural daughter, whom I
"have called *Elizabeth*, and who is now in *England* for
"education, the sum of 5000*l.* sterling or 50,000 cur-
"rent rupees to be paid to her upon her attaining the
"age of twenty-one years or day of marriage whichever
"shall first happen:" provided with the consent of such
of his trustees as shall be in *England* at the time of her
marriage: "but in case my said daughter *Elizabeth*
"should happen to be in *Jamaica* at the time of her
"marriage then I direct that the said sum of 5000*l.*
"sterling be paid to my said daughter upon her attain-
"ing the age of twenty-one years if she be then in
"*Jamaica* or day of marriage which shall first happen;
"and farther my will is, that the said sum of 5000*l.*
"sterling or 50,000 current rupees now vested in the
"Company's bonds be remitted to *England* as oppor-
"tunity may or shall offer; and that the said sum of
"5000*l.* sterling be vested in the Bank or some Govern-
"ment security in trust for my said daughter, and that
"the interest thereof be laid out in the support mainte-
"nance and education of her my said daughter during
"her minority until she shall be entitled to the said sum

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" of 5000*l.* sterling or 50,000 current rupees in manner aforesaid : but if it should happen, that my said daughter should die, before she attains the age of twenty-one years without having married in *Jamaica*, or in case she should marry in *Europe* without consent of my trustees as aforesaid then I will and bequeath the aforesaid sum of 5000*l.* sterling or 50,000 current rupees so bequeathed to my said daughter and all interest accumulated thereon" between his brother *William Adderley*, and sister *Mary Courthope*, share and share alike. The testator gave 2000*l.* sterling to his said sister *Mary Courthope*, to be paid immediately after his decease; and also to his brother *William Adderley* the sum of 1000*l.* sterling or 2000 sicca rupees " to be paid to my said brother out of my monies in *India* so soon as the same can be remitted to *England* after my decease;" and he gave to *John Bryan Courthope*, his sister's husband, the sum of 50*l.* sterling to buy a ring.

The question arose upon the claim of the Plaintiff under the bequest of 5000*l.* sterling or 50,000 current rupees, as a pecuniary, not a specific, legacy.

*Sir Samuel Romilly* and *Mr. Bell*, for the Plaintiff.

The late decisions lean much against specific legacies; requiring a clear intention to make a legacy specific: the consequences pressing with great hardship; sometimes upon the specific legatee; who can find nothing, that answers the description: sometimes upon the other legatees; in the case of a deficiency. This legacy is described both by the *English* and the *Indian* denomination: with some variation; as in the direction to convert it into an *English* security; where it is called, " the said sum of 5000*l.* sterling:" the testator having in contemplation

temptation the destruction of the specific security, in which it was then vested. Many cases have gone much farther; establishing, against a description much more specific, that the legacy was general; with a direction, pointed to some particular fund, as the first subject of application: the legacy however not depending upon that fund; but to be paid, though it should fail; not being specific, unless it must be considered as a bequest of an individual *corpus*: *Coleman v. Coleman* (50). *Roberts v. Pocock* (51). *Kirby v. Potter* (52). *Sibley v. Perry* (53). *Deane v. Test* (54). *Lambert v. Lambert* (55). This principle, adopted early from the civil law, applies with more force to a provision for a child; and, as in this instance, a natural child.

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Mr. Hart, Mr. Abercromby, and Mr. Wingfield,  
for the Defendants.

This is a specific legacy within the cases referred to, and *Ashburner v. M'Guire* (56), *Chaworth v. Beech* (57), and *Innes v. Johnson* (58). The question must be determined upon the intention, collected from the whole Will; and the first legacy shews clearly, that the testator knew in what manner he was to give the *corpus* specifically; marking the sum, the subject of that bequest, as being then in the possession of the *East India* Company. So, the legacy, which is the subject of this suit, is that sum, afterwards described, as being vested in the Company's bonds: the testator not, as has been said, contemplating the destruction of that specific article;

- |                           |                          |
|---------------------------|--------------------------|
| (50) Ante, Vol. II, 639;  | (54) Ante, Vol. IX, 146. |
| see the note, 641.        | (55) Ante, Vol. XI, 607. |
| (51) Ante, Vol. IV, 150.  | (56) 2 Bro. C. C. 108.   |
| (52) Ante, Vol. IV, 748.  | (57) Ante, Vol. IV, 555. |
| (53) Ante, Vol. VII, 522. | (58) Ante, Vol. IV, 568. |

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article; but meaning, that it should remain during his life; and merely directing, that it should be remitted to *England*, as soon as conveniently can be after his death: considering 5000*l.* sterling and 50,000 current rupees as the same thing; as they are considered and treated in *India*.

Sir *Samuel Romilly*, in Reply.

In the case of *Ashburner v. M'Guire* Lord *Thurlow* had no doubt, that the legacy was specific: the difficulty was upon the other point: the distinction, that formerly prevailed, and was supposed to have existed in the Civil Law; that where a debt, which had been bequeathed, was received by the testator, if he received it by the voluntary payment of the testator, the legacy to the same amount stood: if the debtor paid it upon suit or demand, the effect was an ademption (59). The precise case now before the Court is put by Lord *Loughborough* in *Roberts v. Pocock* (60): "*Si Testator scripserit: 'Aureos quadringentos Pamphilæ dari Volo, ita ut infra scriptum est: ab Julio Autore Aureos tot; & in Cassis quos habeo tot; & in Numerato quos habeo tot; & post Multos demum Annos decesserit, cum jam omnes summæ in alios usus translatae essent: responsum fuit, 'Pamphilæ quadringenta deberi; quia veresimilius est, 'Patrem-familias demonstrare potius Hæredibus voluisse, unde Aureos quadringentos sine Incommodo Rei familiaris Contrahere possent, quam Conditionem Fidei-Commisso injecisse, quod ab Initio purè datum esset.'*" (61)

The

(59) That distinction was over-ruled by Lord *Camden*, in *The Attorney General v. Parkyn*; who was followed by Lord *Thurlow*. See also *Fryer v. Morris*, ante, Vol. IX, 380.

(60) Ante, Vol. IV, 150.

(61) *Voet*, upon the *Pandects*, 35, tit. 1, s. 5.

The legacy, as first given, being pecuniary, the intention to make it specific, imposing the consequent inconvenience either upon that legatee, or the others, according to the event, must be clearly made out from subsequent circumstances.

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If the subject of this bequest is a distinct sum of 5000*l.* sterling, or the sum of 50,000 current rupees secured by the bonds of the *East India* Company, there is no room for argument. If, on the other hand, the bonds were to pay the sum of 5000*l.* sterling or 50,000 current rupees, the question fairly arises, whether this is a demonstrative legacy, as it is termed, with a fund, pointed out for payment; or a bequest of that debt, constituted by the bond; and the alternative expression would make no sort of difference. It is obvious, that I should not decide this question with prudence in the case of infants, without knowing the fact; whether the condition of these bonds is in the alternative; which information may be obtained. There is also a residuary legatee: the testator speaks in other parts of the Will of monies and funds in *India*; and the facts, whether the bonds were, or were not, security for the sum of 5000*l.* sterling, as well as the 50,000 rupees, and whether that was the whole, or a part only, of his property, then vested in the Company's bonds, are material.

There is no doubt, that the first legacy in this Will is specific. The testator, taking notice, that the bills, in which that legacy was invested, then lay for acceptance at the *India* House, and, adverting to the fact, that the identical sum would be received, it is impossible to say, that is not *Legatum Debiti*. It is almost expressed in terms. As to the other legacy, I agree, the Court is to  
favor,

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favor, as far as it can, the construction, that the testator, placing himself *in loco Parentis*, intended a provision for his daughter in all events; that, if his obvious anxiety for that object should be defeated by the nature of that provision, the effect would be very unfortunate; and my opinion is, that this is originally a legacy of money, 5000*l.*, or 50,000 current rupees, considered as of the same value; and, that, even if the bonds should turn out to be in the alternative, it is not specific; being no more than a bequest of a sum of money; pointing out a particular mode of payment, by a fund, provided in the first instance. This is my opinion upon the case, in which alone the question can arise, if the sum of 5000*l.* was secured by the same instrument: but I should not be justified under the circumstances of this case in making the decision without information as to the nature of the securities, which may be obtained by inquiry at the India House.

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#### JUDD v. PRATT.

Devise by the  
 general terms,  
 "all the rest,  
 "residue, and  
 "remainder of  
 "my real and  
 "personal es-  
 "tate of what  
 "nature or

THIS case (62) came on upon an Appeal from the Decree, pronounced at the *Rolls* by Lord Masters, then Baron Sutton, and the Masters in Chancery, Mr. Simeon and Mr. Cox; dismissing the Bill. The cause was again argued by Mr. Fonblanque and Mr. Woodeson,  
 (62) Reported ante, Vol. XIII, 168; see the notes.  
 "kind soever" to nephews and nieces, not being for creditors, wife, or children, is not sufficient to raise a case of Election, or for supplying the want of surrender of copyhold land, contiguous and intermixed with freehold, against the heir.

*deason* (63), for the Plaintiffs; and *Mr. Richards* and *Mr. Wingfield*, for the Defendant.

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*The Lord CHANCELLOR.* \*

The question, brought forward by this Appeal, arises upon a residuary devise of real and personal estate: part of

(63) The following manuscript note, which was cited by *Mr. Wooddeason*, is inserted by the favor of *Mr. Hargrave* :—

FRANK v. LADY STANDISH.

Testatrix, having surrendered her copyhold estates to the use of her Will, made an exchange of some part of them for other copyhold estates; and then devised all her freehold and copyhold estates with divers limitations; under which *A.* and *B.*, two of her three co-heiresses, were beneficially entitled; and *A.* and *C.* (the third co-heiress) were also pecuniary legatees. The question was, whether the co-heiresses, claiming under the Will, could take the copyhold estates, which, having been taken in exchange, had not been surrendered to

the use of the testatrix's Will.

*Mr. Comyn*, for Plaintiff.— In *Jenkyns v. Jenkyns*, before *Lord Talbot*, the Testator devised a close, which belonged to *A.*; and gave *A.* 200*l.* *Lord Talbot* held, that if *A.* took the legacy, he must give up his close to the devisees of it.

*Mr. Clarke*.— *Wilson v. Andesoif*, lately determined at the *Rolls*: a case of copyhold not surrendered. A surrender decreed by an heir at law; who took a legacy under the same Will, by which the copyhold was devised.

*Mr. Attorney-General*, for Defendant, *Dame Catherine Standish*.

The word "copyhold" is placed in the Will after a general description. There are other copyhold estates, to

In the Court of EXCHEQUER, after *Michaelmas* Term, 1772.

Devise of all freehold and copyhold estates.

The copyholds were surrendered to the use of the Will: but the testatrix afterwards exchanged part for other copyholds; which were not surrendered: the heir, claiming beneficially under the Will, was put to Election.

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of the estate consisting of copyholds, contiguous to, and intermixed with, freehold: whether the customary heir who

to answer the words of the Will. The former surrender shews, that she was apprised of the necessity of a surrender. If the Will is not sufficient of itself to convey such an estate, it has not been held sufficient to put the party to an Election. In *Noys v. Mordaunt* there were estates in fee-simple, and estates tail; and, though estates tail could not pass by the Will, yet that was for want of power in the person devising. The land would pass by Will. *Herle v. Greenbank*, 1 Ves. 296: the rule does not go to make good that, which is no Will. The Will was not executed according to the Statute of Frauds: it was compared to the case of devise to charitable uses; which is a want of capacity to devise.—*Case of Lord Colville, in Chancery*.

Mr. *Perryn*.—In *Noys v. Mordaunt* the testator devised his estate tail; and the Will could not stand, if the estate tail had not passed by it, *Wilson v. Andesoif*:

Wilson had agreed for the purchase of copyhold estates; they had been surrendered to him out of Court: but the surrender had not been presented by the homage; and he devised the copyhold by name: there was no admission; nor surrender to the uses of the Will.

Lord Chief Baron *Smythe*.—It is a principle, that a devise by Will is under a tacit condition, that the Will shall be submitted to: *Streatfield v. Streatfield*: *Cas. temp. Talbot*.

Herle v. Greenbank was cited: that case turned much on this question, whether an infant could dispose of land: there was an incapacity in the person to dispose.

Boughton v. Boughton, before Lord *Hardwicke*, was founded on an implied condition, that the Will should be submitted to. I think, this case falls within the reason of *Noys v. Mordaunt*. Here is a want of *formality* of surrendering the copyhold estate;

who takes a legacy of 500*l.* can maintain a claim to the copyhold estates, as not surrendered to the use of the Will: in other words, whether this is a case of election. It is settled, that a Court of Equity will apply the doctrine of election to copyhold estate, not surrendered to the use of the Will. The true question therefore is,

whether

estate; in *Noys v. Mordaunt* there was a want of formality in barring the entail.

Adams, Baron.—The rule in equity has been carried so far, as that, even where the testator had only an estate for life, yet the devisee should be bound; this was the case of *Streetfield v. Streetfield*. In the present case testatrix was absolute owner. It is exactly like *Noys v. Mordaunt*. I had at the hearing some doubt on the case of *Herle v. Greenbank*: but I think, there is a solid distinction between that case and the present.

PERROTT (Baron).

It is an established principle, that a devisee shall not take a bounty to himself, and deprive any other person of a bounty under the same Will. Testatrix made exchanges for convenience of the estate; and then devises the copyholds in express terms. If she had been less express in her Will, it

could not be imagined, she meant to separate these copyhold estates.

Eyre (Baron), of the same opinion.

(Taken from Sir John Skynner's Brief.)

It appears also by Lord *Kenyon's* note of the same case, that Lord Chief Baron *Smythe*, and Baron *Adams*, put the case on the doctrine of Election; as did Baron *Perrott*; who also argued on the intention. *Eyre (Baron)*, of the same opinion.

Decree.—The Defendant Dame *Catherine Standish* having made her election to take under the testatrix's Will by accepting her said legacy of 1000*l.* It is ordered, that the Defendant Dame *Catherine Standish*, and the other co-heiresses at law of *Margaret Frank*, deceased, do surrender, &c.

Devisee of a copyhold, not admitted, cannot devise it. *Wainwright v. Elwell*, 1 *Madd.* 627.

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The doctrine of Election applied to copyhold estate, not surrendered to the use of the Will.

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whether the testator is to be considered as having manifested an intention to devise the copyhold estate. The case of *Byas v. Byas* (64) is a strong authority upon the point; which case, as I find by my own note, was relied on by Lord *Thurlow* in *Lindopp v. Eborall* (65); holding, that the general words in that Will did not pass the copyhold estate; and, though the judgment, as it appears in the report of that case, is not very intelligible, it is sufficient to recal the meaning of Lord *Thurlow* to the minds of those, who heard him. His meaning was, that, where a testator intends to provide for his child, the Court cannot determine, whether the provision shall be large or small, more or less: but can only say, that he does not intend a provision for that

Distinction, as to supplying a surrender by implication from general words between the cases of creditors and children: in the latter the intention is satisfied by freehold estate: the extent of the provision being indefinite; which in the other is measured by the amount of the debts.

child. If therefore there is a freehold estate, that will answer the purpose of a provision, the Court has no means of ascertaining, that he intended a larger provision: but where the Court regards a testator as proposing, that his debts shall be paid, the amount of the debts must ascertain the value, to be applied to that purpose; and if the debts cannot be discharged by the freehold estate, the Court draws the inference, that the testator meant to provide a fund, which would be sufficient to answer that, his purpose. In the one case, the parent intending to make a provision for his child, if that is done by the appropriation of a freehold estate, the extent of the provision being undefined, there is no reason for increasing it by the addition of the copyhold estate: in the other, the testator, meaning, that all his debts shall be paid, must be considered as intending to provide a fund, sufficient to answer that, his purpose and intention.

In the case of *Kidney v. Coussmaker* (66) the Master
 of

(64) 2 *Ves.* 164.

(66) *Ante*, Vol. XII, 136.

(65) 3 *Bro. C. C.* 188.

of the Rolls, going certainly upon the Will, appears to consider *Byas v. Byas* and *Lindopp v. Eborall* as rightly determined. This is not the ordinary question, whether the want of surrender is to be supplied, but whether the testator has manifested an intention to pass the copyhold estate; which is however only another mode of expressing the same idea; as, if he has manifested that intention, all the cases prove, that the Court will supply the surrender for creditors, the wife, or children. The question therefore is, properly, whether these words "all the rest, residue, and remainder of my real estate whatsoever and wheresoever, and of what nature and kind soever" manifest the intention to pass copyhold estate; and the Courts have in all these cases said, that those words are not a sufficient indication of that purpose except for the satisfaction of debts. It comes therefore to the same thing. If the intention is manifest, the surrender will be supplied; and the case of election arises: but the same authorities, that bind me to say, the intention is not manifest for the purpose of supplying the surrender, bind me also to say, it is not manifest for the purpose of raising a case of election. Upon the whole therefore I think this case rightly determined.

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The Decree was affirmed (67).

(67) See the next case.

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Dec. 17th, 18th,

Ante, Vol.

XII, 426.

Upon Appeal
the Lord Chan-
cellor's opinion
being, that the
reversion of
the copyhold
estate passed
under the ge-
neral devise,
"as to all such
worldly es-
tate and ef-
fects as it
may please
God to bless
me withal,
or I may
leave, or I
may be en-
titled to, at
the time of
my decease,
whether real
or personal,
not before
given or dis-
posed of,"
especially if
there was no
freehold es-
tate, inquiries

THE Plaintiff in this cause appealed from the De-
cree, pronounced at the *Rolls* (68). Upon the
argument of the Appeal there was a considerable differ-
ence at the Bar upon the fact, whether the account of the
personal estate was waived by the Plaintiff; and it could
not be ascertained. The Defendants also alleged at the
Bar, that there was freehold estate; and, farther, that
Charles Mundy had surrendered to the use of his Will;
which fact, if true, would put an end to the question.
The Plaintiff's Counsel stated from the Probate of the
Will of *Hugh Mundy*, jun. that the reason for the de-
vise to his wife, was given; viz. that she might maintain
the children; which was material as to the intention.

Sir *Samuel Romilly* and Mr. *Plowden*, for the Plain-
tiff, contended, first, that the surrender by the testator
Hugh Mundy, the younger, of the reversion of these
copyhold premises to the uses of his Will was not
necessary: admitting, that if necessary, though the ques-
tion, whether under general words the want of sur-
render should be supplied in favor of the widow, has
not been decided, and Lord *Hardwicke* expressed the
contrary opinion in the case of *Chapman v. Hart* (69),
it is difficult to distinguish the case of copyhold estate
from that of leasehold estate; which is there decided. The
distinction

(68) Ante, Vol. XII, 426; (69) 1 *Ves.* 271; see page
see the references. 273.

were directed to ascertain that fact; and also, whether there was any
custom of surrendering a vested interest in reversion or remainder,
expectant upon an estate tail.

distinction between the case of a widow (70), and creditors, admitted in *Byas v. Byas* (71), and *Lindopp v. Eborall* (72), certainly stands upon sound reason. The Court supplies the want of surrender for a widow, or a child, where the testator has only a copyhold estate; conceiving him to be fulfilling a moral obligation: so, being under a moral obligation to pay his debts, he is considered as satisfying that obligation; and therefore, though there may be freehold estate, if the value is not sufficient, the inference of an intention to make a provision, adequate to the object, requires the application of the copyhold estate: but in the other case the indefinite nature of the obligation does not afford the principle, upon which that inference may be collected. The Court in these cases proceeds always upon the intention; adhering at the same time to certain established rules. The case of *Rose v. Bartlett* (73), which certainly is not to be disturbed, furnishes only a rule of construction; and, if a clear intention to pass this copyhold estate can be found, the cases of that class have no application. The general words "real estate" or lands and tenements alone are certainly not sufficient to shew an intention to pass copyhold, or leasehold, estate; the testator having freehold: but it was never held, that, if a clear intention appears to comprehend every interest, which by any possibility the testator may have, or can dispose of, he shall not be taken to include, in the one

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(70) See the same distinction between the cases of children and creditors, stated by the Lord Chancellor in *Judd v. Pratt*, the preceding case.

(71) 2 Ves. 164.

(72) 3 Bro. C. C. 188.

(73) Cro. Car. 293. See *Thompson v. Lawley*, ante, Vol. V, 476. 2 Bos. & Pul. 303. *Watkins v. Lea*, Vol. VI, 633.

case,

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case, copyhold estate; in the other, leasehold: the rule applying precisely in the same way to each.

The ground, upon which *Rose v. Bartlett*, and the other cases of that class, have proceeded, is, that the testator, using the words "real estate," must be understood to mean freehold: a construction, perhaps originally doubtful: but not to be now disturbed. Where he has done what is required by the Statute of Frauds (74) in a devise of freehold estate, the Court will not understand him as intending estates of any other description. In the case, put by Lord *Hardwicke*, the testator, not having observed the necessary form, might be considered as not intending to comprehend under those general words the copyhold estate: but can that argument be used here? Can it be said, this copyhold is not a part of all the testator's worldly estate? Admitting, that copyholds, though part of the "lands," and part of the "real estate" will not pass under either description, the Court will not go beyond actual decision upon this subject.

The *Master of the Rolls* appears to have relied much upon the circumstance, that the property, which is the subject of this residuary disposition, was to be enjoyed after the death of the testator's wife by *Charles Mundy*: the person, upon whose death without issue the reversion of this copyhold estate would fall in. With reference to that argument it is to be observed, that this is a residuary disposition of every thing, all such worldly estate and effects as he may leave, or be entitled to, at his decease, whether real or personal, not before disposed of. The case (75), referred to in the Judgment at the  
*Rolls,*

(74) Statute 29 Char. II,  
 c. 3.

(75) *Roe v. Avis*, 4 Term  
 Rep. 605.

*Rolls*, requires much more consideration than it appears to have received in the Court of King's Bench. That is the first decision, that the nature of a devise is to be taken into consideration, for the purpose of determining, whether a reversionary interest would pass: a dangerous mode of construction. The general, established, rule, that a residuary devisee, the *Hæres factus*, is substituted for the heir at law to all intents, without regard to the nature of the devise, and takes even what was not in the contemplation of the devisor, is inconsistent with that decision.

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The adoption of that reasoning by the *Master of the Rolls* is however a strong authority for collecting the intention from all parts of the Will. Though in *Lindopp v. Eberall* (76) many words were used, they have no greater effect than these general words; which are most extensive. Under a devise of "all my lands and tenements of whatsoever tenure they may be to my wife" it would be extremely difficult, referring to the nature of the estate, as depending upon the tenure, to say, copyhold estate was not comprehended. Such a case certainly was never decided. The Court must collect the intention; always having regard to the rule established in *Rose v. Bartlett* (77); and upon the whole of this Will the reversionary interest in this copyhold estate was intended to pass.

Mr. Richards, Mr. Fonblanque, Mr. William Agar,  
and Mr. Roupell, for the Defendants.

The general Law, as to the necessity of a surrender in this case, as laid down in *Watkins* (78), is that, though  
nothing

(76) 3 Bro. C. C. 188.

(78) 1 Watk. Cop. 58.

(77) Cro. Char. 293.

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nothing can properly be the subject of surrender, except the legal estate, it is not necessary, that the interest should be an estate in possession: the remainder-man or reversioner being equally in the seisin of the fee. The words of this Will have no more particular application to copyhold estate than the very large words in the other cases, from *Lindopp v. Eborall*. The general presumption, that, freehold estate is intended, cannot hold in this instance: the Will not being executed so as to affect freehold estate. Can the Court say, copyhold estate shall pass by words, which, if the Will was duly executed, would pass, and properly apply to, freehold estate? In the case of *Milbourn v. Milbourn* (79) the devise was of all the devisor's messuages, farms, lands, tenements, and hereditaments, in the counties of *Huntingdon* and *Cambridge*, to his wife for life; with remainder to his first and second sons in tail, and other remainders over; having previously declared, that as to all his worldly estate, with which it had pleased God to bless him, he disposed thereof as follows. There was no surrender of the copyhold estate. Lord *Kenyon* said, he could not understand the distinction, taken by Lord *Macclesfield* in *Drake v. Robinson* (80) between children and creditors: (a distinction, now very fully explained) (81); and held, that "as there was freehold land to answer the devise, the defect of the surrender ought not to be supplied."

Admitting, that the general words, used in this residuary clause, are sufficiently large to include this reversionary

(79) 2 Bro. C. C. 64. Cited  
 from a manuscript note by  
 Mr. Cox.

(80) 1 P. Will. 443.  
 (81) See *Judd v. Pratt*:  
 the preceding case.

sionary interest the Court is in the habit, for the purpose of collecting the intention, of referring to the limitations and objects of the Will: *Chester v. Chester* (82). *Strong v. Teatt* (83). *Sheffield v. Lord Mulgrave* (84). The wife, for whose benefit this devise is supposed to be intended, could not derive benefit from this reversion. In the case put by Lord *Hardwicke* in *Chapman v. Hart* (85), the Will not being attested by three witnesses, the freehold estate certainly would not pass: the Will therefore, unless it operated upon the copyhold estate, would have been altogether ineffective: precisely as if the testator had no estate. The moral obligation upon the testator to make a provision for his wife, or child, may be answered equally by the application of personal estate, as of real. This residuary clause includes with freehold, of which there is none, all the leasehold and personal estate; and, if those are sufficient to answer the purpose, as they must be considered, according to the distinction between the case of a wife or children and of creditors, the interposition of this Court by supplying the surrender of the copyhold estate is not necessary: the amount of the provision in the former case not being regarded; as it necessarily is in the latter.

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A surrender to the use of the Will bars the intail of a copyhold; of which, strictly, a recovery cannot be suffered: but any act, shewing the intention to bar, will have that effect.

Sir *Samuel Romilly*, in Reply.

A surrender to the use of the Will has not that effect, \*where there is, as in this manor, a custom for a recovery.

[ \*402 ]

It

(82) 3 *P. Will.* 55.

(84) *Ante*, Vol. H, 526.

(83) 2 *Bur.* 912.

5 *Term Rep.* 571.

(85) 1 *Ves.* 271.



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It is difficult to support the case of *Roe v. Avis* (86), with reference to strong reasons, appearing upon the face of the Will, against the inference, drawn by the Court of King's Bench. It is of no consequence to shew, that a general residuary disposition of all property whatsoever and wheresoever has no direct and easy application to some particular species of property, that may be pointed out: the construction being, that the testator means to give, generally, every interest of whatsoever description: whether occurring to him at the time, or in no degree in his contemplation. The residuary disposition in *Strong v. Teatt* (87) is not of that description. The case of *Chester v. Chester* (88) supports the proposition, just stated: a residuary devise of all his lands, &c. in the places mentioned, or elsewhere, not by him formerly settled, or otherwise disposed of, passing the reversion in fee of the lands in settlement: the testator having contemplated only the lands not in settlement. This testator, having no other estate, must be taken to mean the copyhold by this species of devise; than which none is more familiar. The inference from the devise to his brother *Charles*, that the enjoyment was to be in him personally, would be just if the devise to him was for life only: but the devise to him and his heirs cannot have that effect; and it is impossible to collect an intention not to dispose of this property: a purpose, inconsistent with the whole plan of the Will; providing for his own and his brother's children; declaring his intention for their maintenance, &c.; to which, upon the *supposition, that there is no real estate, there is no other fund applicable.

[*403]

Admitting

(86) 4 Term Rep. 606.

(88) 3 P. Will. 55.

(87) 2 Bur. 912.

Admitting even, that there was freehold estate, yet this copyhold would have passed under these most extensive words. In *Milbourn v. Milbourn* (89) Lord *Kenyon*'s attention does not appear to have been drawn to the introductory words "all my worldly estate," &c.; and the conclusion seems to be, that from the manner, in which the devise was made, (something, which is not even in Mr. *Cox*'s note, appearing to have been relied on), the intention not to pass that copyhold estate was collected. There is no instance of a residuary devise in terms more extensive and general than these; calculated to embrace all property, of every description; and, if that intention appears, however collected, this being always a question of intention, the Court will supply the surrender in favour of a wife; having regard to the established rules.

1808.
CHURCH
v.
MUNDY.

The Lord CHANCELLOR, having in the course of the argument expressed his dissatisfaction with the case of *Roe v. Avis* (90); pronounced the following judgment:—

It is not necessary to determine a question, which may in some future stage be material; whether this estate was capable of being surrendered; upon which it may be fit to consider cases, that have occurred: one particularly; in which evidence was produced, that there was no custom

Copyholder's
right of sur-
render to the
use of his Will;
though no in-
stance upon
the records of
the manor: or,
if no such cus-

(89) 2 Bro. C. C. 64. Cited from a manuscript note by Mr. Cox. (90) 4 Term Rep. 605.

tom, there must be some mode of disposition by deed; as in the case of customary freeholds; the want of which (in the case of creditors, &c.) will be supplied.

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 CHURCH
 v.
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in the manor to surrender; and Lord *Thurlow's* opinion was, that such a negative custom was good for nothing: the Court would hold, that there might be a surrender to the use of the Will; though no instance could be found upon the records of the manor: or, if there could be no such custom, there must be some mode of disposition by deed, as in the case of customary freeholds; the want of which this Court would supply (91).

I consider this case however upon the admissions, on which the *Master of the Rolls* must be supposed to have decided it; and the judgment goes to this; that, supposing, this testator had no freehold estate, and there was no objection from the circumstance, that the Will was not attested by three witnesses, still, attending to the nature of his interest in this copyhold estate, he did not intend to give it by his Will; not even under such circumstances: that intention being collected from construction, according to legal rules of interpretation. Having in that view of the case a different opinion, I express it with all the respect, due to the judgment, from which I dissent; but, supposing there was no freehold estate, and no objection upon the attestation of the Will, I cannot think upon reading this instrument, the true interpretation, as applied to the interest the testator had, is, that he did not intend to pass that interest. Consider this, not as a copyhold, but as the reversion of an estate in fee-simple; that the testator had no other real estate whatsoever; that his brother *Charles* was tenant in tail of that estate; that the testator gave all he had of worldly estate, and attempted to give all he should have at the time of his death, (a vain attempt as to real estate) in this way: to his wife for life; to his children at her decease; and for default of children, if his brother *Charles* should not be living at his decease,

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(91) *Pike v. White*, 3 Bro. C. C. 286.

cease, or should die in the life of his wife, then according to her appointment; but if *Charles* should be living at either of those periods, that all his worldly estate should be conveyed to his brother in fee: is it to be laid down, as a clear rule, that, as the present interest of the testator is only a reversion upon an estate tail, existing in another person, which may, or may not, be barred, and the determination of which in the testator's life might possibly be contemplated, the wife and children would not take that interest, which the words will comprise? In the common course of settlement by a father, making his eldest son tenant for life, with remainder to his first and other sons in tail male, and similar limitations in strict settlement to the second son, and his sons, if the father, entitled to the reversion in fee, devised all his real estate to the first and other sons of his eldest son in tail general, with remainder in the same manner to the sons of his second son, and then to his own right heirs, unquestionably all those subsequent limitations would be well created; enlarging the estates in tail male, before limited.

This case goes much farther. The question is, not, whether, where there are other subjects applicable, this reversion shall be applied, but whether, as the purposes of the Will are such, to which this subject cannot be so conveniently applied as a present interest, in possession, not in remainder, the testator is to be considered as meaning nothing by this clause. In every case upon this point the testator had some property, which was the foundation of an argument, that property, which could be conveniently applied, should pass, and that, which could not be conveniently applied, should not pass. That conclusion is very much confirmed by this Will; adverting to the different situations, in which the testator's family may be at his decease; particularly, that the tenant in

1808.
CHURCH
v.
MUNDY.

1808.
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 CHURCH  
 v.  
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tail might not be living. If the testator had been asked, whether he meant to dispose of his reversion, if his brother should be living, his answer would have been, that he intended to dispose of all he could dispose of; to take the chance for his wife and children: the instrument itself supposing, that his brother may die before him; and disposing in terms, that can apply to nothing except this property. If the event of his brother's death within a week, without barring the intail, had been put to him, he would have answered, that in that event he intended to pass this property; and he would not have thought it necessary to re-publish his Will; which, if the words are sufficient to carry this property, would not be necessary.

Rule of construction, upon the effect of general words in a Will, as applying to rents and profits, undisposed of, reversions, &c. to consider as intended what falls within the usual sense; unless declaration plain to the contrary.

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I am strongly influenced towards the opinion, that a Court of Justice is not by conjecture to take out of the effect of general words property, which those words are always considered as comprehending. The cases upon the effect of general words, as applying to rents and profits, not disposed of, as in *Hopkins v. Hopkins* (92), or to a reversion, altogether unlikely to fall into possession, have gone upon this; that it is much more safe to consider those subjects intended, which the words describe, than to supply a purpose by conjecture; determining for the testator upon the more or less convenience, with which that subject may be, which he has declared shall be, applied. The best rule of construction is that, which takes the words to comprehend a subject, that falls within their usual sense, unless there is something like declaration plain to the contrary; and surely \*that is the safest course, where, as there is no other subject, to which they can be applied, the testator must, if he does not mean that, be considered as having no meaning.

la

In this view of the case my opinion is, that, if this testator had no freehold estate, and no objection arises from his having used the words "real estate," as it has been put by Mr. *Richards*, those words are capable of application to the reversion of the copyhold estate (93). As to the rest of the case, the opinion, expressed by Lord *Hardwicke* in *Chapman v. Hart* (94), is an authority of great weight; which I should not be authorized to displace without facts, calling for my opinion. It is enough, that there may be a distinction, where the testator, at the time of preparing his Will, has both freehold and copyhold estate, and where he has copyhold only: in which latter case the foundation for supposing a change of intention, by his abstaining from executing the Will according to the Statute (95), may be wanting. I should go too far by giving an opinion as to that upon a hypothetical case. I shall therefore only direct a reference to the Master to inquire, whether this testator had any, and what, freehold estate at the time of making his Will; and to state, what estate and interest he had in such freehold estate; if any; also, whether there is in this manor any custom of surrendering a vested interest in reversion or remainder, expectant upon an estate tail.

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CHURCH  
v.  
MUNDY.

(93) *Pennington v. Pennington*, 1 *Ves. & Bea.* 406.  
See 2 *Ves. & Bea.* 197.

(94) 1 *Ves.* 271; see 273.  
(95) Statute 29 *Char.* II.  
c. 3.

1806.

(96) BIRD v. HARRISON.

Dec. 20th, 21st.

Bill by a widow, devisee in fee, impeaching a mortgage by her, while co-vert, for want of a Fine. Answer, admitting possession of the Will, and the title under it; alleging the loss of the settlement; stating it differently from the Bill, by the addition of a power of revocation and appointment of new uses, by the exercise of which a Fine was not necessary.

Production of the Will, not being offered by the Answer, ordered on Motion.

**T**HE Plaintiff, the devisee in fee of *Mary Cox* deceased, on her marriage settled her estates to uses, to the husband for life, with remainders to the wife for life; and to the issue in tail; remainder to the wife in fee; as alleged in the Bill. Afterwards, the husband, becoming distressed, joined with his wife in mortgaging the estate: but no fine was levied. These mortgages by assignment came to the Defendant. The Bill was filed for an account against the mortgagee in possession, and for a discovery of deeds, and of the Will of *Mary Cox*; which was in the possession of the Defendant: the Bill insisting, that, no fine having been levied, and the husband being dead, the Plaintiff was entitled to the estate free from the mortgage.

The Defendant by his answer admitted the Will of *Mary Cox* to be in his possession; but set it out in some degree different from the statement in the Bill; and did not offer to produce it. The difference did not go to impeach the devise to the Plaintiff in fee; but it was stated to be after the death of a tenant for life, whom the Answer admitted to be dead. The Answer then stated the settlement to be lost; but set it out in a different manner from the statement in the Bill; alleging, that it was to the use of the husband for life; with remainder to the wife for life: remainder to the issue in tail: remainder to the wife in fee; with power to revoke those uses, and appoint new uses; that the settlement was not in the Defendant's possession; but was lost; and that the

(96) *Ex Relatione.*

the Plaintiff and her husband duly revoked the uses of the settlement; and appointed new uses, in favor of the mortgagee; so that no fine was necessary to make the mortgage good.

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BIRD  
v.  
HARRISON.

The Plaintiff moved, that Defendant should produce the Will for the inspection of the Plaintiff.

The Lord CHANCELLOR said, upon the Bill and the answer the Plaintiff was entitled to the production; and made the Order.

Dec. 21st.

DAWSON v. CLARK.

ROLLS.

1809.

Feb. 26th.

March 1st.

**G**EORGE FORSTER by his Will gave and bequeathed to his friends *John Wealleans* and *Robert Clark* all and singular his estate and effects whatsoever and wheresoever, that he should die possessed of, or entitled to, or interested in; to hold the same and every part thereof unto the said *John Wealleans* and *Robert Clarke*, their heirs, executors, administrators and assigns, for ever, upon trust in the first place to pay, and charged

Testator gave all his estate and effects to two persons, their heirs, executors, &c.; upon trust in the first place to pay, and and charged and chargeable

with, all his debts and funeral expences, and the legacies after given.

Those persons, whether they could claim in their individual characters, or not, being afterwards appointed executors, held entitled to the residue, undisposed of, (including a legacy to a Charity, void by the stat. 9 Geo. II. c. 36) for their own benefit, against the claim of the next of kin: the whole property being personal.



1808.  
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 DAWSON
 v.
 CLARK.

and chargeable with all his just debts and funeral expences, and also the several legacies to the several persons by him thereafter given and bequeathed.

The testator after several legacies gave and bequeathed the sum of 1200*l.* for the establishing a Free School for the educating fifteen boys and ten girls belonging to the poor inhabitants of the parish of *Woodhorn* and chapelry of *Newbigin*: the said sum to be laid out by his executors hereinafter named on a freehold property; and to be by them conveyed to the vicar of *Woodhorn* and *Stephen Watson*, esq. his heirs, executors, administrators, and assigns; whom he appointed and their successors for the time being trustees and governors of the said school for ever. Then, after several directions for the regulation of the Charity, he declared that to be his last Will: and did thereof name, constitute, and appoint, the said *John Wealleans* and *Robert Clark* joint executors.

The Will was attested by three witnesses: but it did not appear, that the testator had any real estate. The Bill was filed by the next of kin of the testator; insisting, that the legacy to the Charity was void by the Statute(97); praying an account of the personal estate; and claiming the residue, or so much thereof as was given to the Charity, as not being disposed of; which was also claimed by the Defendants, *Robert Clark*, the surviving executor, and the personal representatives of *John Wealleans*, the other executor, deceased.

Mr. *Richards*, Mr. *Alexander*, and Mr. *Bell*, for the Plaintiffs.

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The charitable legacy being clearly void, the question

(97) Statute 9 Geo. II. c. 36.

tion arises, whether these devisees are made executors in trust. In a case, *Robinson v. Taylor* (98), which has a strong resemblance to this, persons were declared executors upon trust; and particular trusts were pointed out; which did not exhaust the whole; and it was held, that they were generally executors in trust; and that the interest, which was not disposed of, belonged to the next of kin.

1808.
DAWSON
v.
CLARK.

Supposing the executors to be entitled to the general residue for their own benefit, they cannot take, as part of that residue, this particular legacy to the Charity; which is void. One of the trusts, upon which that residue is particularly given to them, is to pay that legacy. As to that sum, which the testator attempted to take out of the residue, he has clearly declared them trustees: which declaration, if applied to the general residue, would unquestionably make them trustees of the whole; and must have the same effect as to this particular fund; which happens by the failure of the trust proposed to be part of the residue. This is not the ordinary case of lapse. The testator never intended that fund to go upon any contingency to the executors, except as trustees; but the failure by lapse may be supposed to have been in contemplation. The cases, *Arnold v. Chapman* (99), *The Attorney General v. Tomkins* (100), and *The Attorney General v. Lord Winchelsea* (1), are all authorities against the executor.

Sir Samuel Romilly, Mr. Hart, and Mr. Cooke, for the Defendants.

There is no decision, that the expression of that trust,

[412]

(98) 2 Bro. C. C. 589.

(100) Amb. 216.

Ante, Vol. I, 44.

(1) 3 Bro. C. C. 373.

(99) 1 Ves. 108.

1806.
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 DAWSON  
 v.  
 CLARK.

trust, which is implied in the mere appointment of an executor, will make him a trustee. The case of *Robinson v. Taylor* (2) does not appear to authorize the position in the margin, that the executors were trustees for the next of kin (3). Taking that point however to be so decided, that case cannot govern this. There were many circumstances, favouring the inference of a trust; particularly one; which was relied on in the late case of *Urquhart v. King* (4); a provision for the indemnity of trustees. By this Will the trust is distinctly and pointedly limited to payment of the debts and legacies: and the residue of the fund is given to these two persons, not as executors, but in their individual characters; subject only to payment of the debts and legacies; with no farther allusion to any trust: the testator adopting the most direct and appropriate mode of giving beneficially, subject only to a charge. The devisee of real estate, charged with the payment of debts, without more, gives a fee.

The question as to the legacy of 1200*l.* is still more clear. When there is a residuary disposition, the next of kin cannot claim a legacy to a Charity, which is void. The testator is considered as meaning to give every thing, that he has power to dispose of; comprehending property, that could not be in his contemplation: his present, or future, right to which he may not know, or foresee. He is not supposed to calculate upon the event of a lapse; but is understood as using comprehensive expressions, embracing all, that does not otherwise pass; knowing, that by the appointment of an executor he substitutes that person for himself; and gives him the right to

(2) 2 Bro. C. C. 589.

been so decided. See the

(3) That point appears by  
 the *Register's Book* to have

judgment.

(4) Ante, Vol. VII, 225.

to every thing, not specifically disposed of: a right, by his legal character of executor, stronger even than that of a residuary legatee by express words. In the late case *Pratt v. Sladden* (5) that legal right of the executors prevailed accordingly against the inference, arising from the appellation of trustees, from a clear trust as to certain parts of the property, and directions, which upon the supposition, that the executors were to take for their own benefit, were unnecessary.

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~  
DAWSON.  
v.  
CLARK.

Mr. *Richards*, in Reply.

It is not contended, that merely as the word "trust" appears in the Will, as applied to the executors, therefore they are trustees. The question is, whether the testator intended, that they should be trustees; and should not have the residue for their own benefit. If he had died seised of real estate, can there be a doubt, that the remnant of that estate, beyond what was necessary for the satisfaction of the legacies, would go by way of resulting trust to the heir at law (6)? They are clearly trustees throughout; and, if that would be the effect as to real estate, it is singular, that it should not be so as to personal property; involved by the testator in the same devise, for the same purpose. The effect of the whole Will is a devise and bequest to the executors; vesting in them all his real, and all his personal, estate, upon trusts, which might have exhausted the whole. How are they discharged from the character of trustees; with which they are in the first instance invested?

As

(5) *Ante*, Vol. XIV, 193. XI, 87, 205. *Wilson v. Coade*,  
(6) See *ante*, *Gibbs v. Ougier*, Vol. XII, 413. *Berry* in the note, I, 45.  
*v. Usher*, *Wilson v. Major*,

1808.  
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 DAWSON
 v.
 CLARK.

As to the legacy of 1200*l.*, there is no authority for the proposition, that it would pass by a residuary clause. It is true, whatever is lapsed would go as part of the residue: but there is a great difference between this and the case of lapse. In the latter at the time of the testator's death there is no legatee: the legacy is gone: the subject is in the testator's contemplation undisposed of: but clearly this sum of 1200*l.* was intended not to go to the executors; nor to the next of kin. The testator died under the impression, that he had well disposed of it: but it is intercepted by the law; and, being clearly not intended to go to the executors, it falls of course to the next of kin.

The MASTER of the ROLLS.

There may be three questions in this case: First, whether the executors, independently of their character, take the property, subject only to a charge: if so, no other question will arise; as, if any charge should fail, they would by force of the gift retain the whole. If they are driven to assert their claim in the character of executors, the next question will be, whether the words "upon trust" preclude that claim; and turn them into trustees.

Instantes,
 where, the residue being intended to be given from the executors, they cannot take it; though the bequest does not take effect.

If it shall be determined, that they take the residue in the character of executors, then the question will be as to the 1200*l.*; whether they take that as part of the residue. There are many determinations, that if the residue is intended to be given from the executors, they cannot take it; though the bequest does not take effect; as where the testator gives it in the manner he shall appoint, and he makes no appointment: so, where a blank is left for the residuary legatees, the executors are not entitled: the intention being evident to give away the residue

residue from them. But the question as to a particular legacy is very different; whether, supposing them entitled to the residue, they must not take it in the same plight; as any other residuary legatees; and then, whether it has ever been held, that a charitable legacy failing shall go to the next of kin; as land, devised to charity, goes to the heir: but he stands upon a very different footing; for a residuary devisee does not take a lapsed devise: whereas a residuary legatee takes every thing that lapses. Perhaps this precise point may not yet have been determined; but there are very general propositions to be met with, that whatever is in any way undisposed of falls into the residue.

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v.
CLARK.

Distinction
between a re-
siduary de-
visee and le-
gatee as to
lapse: the
latter taking
every thing,
that lapses:
the former not.

The MASTER of the ROLLS.

The residue of the personal estate is claimed by these executors in two distinct rights: first, as expressly devised to them, individually, subject only to the payment of the debts and legacies: but, if not so devised, secondly, as not otherwise disposed of; and therefore belonging to them in their character of executors. Being of opinion, that, though the first point should be determined against them, the second must be decided in their favor, it is not necessary to enter into the consideration of the former. There is a case, *Coringham v. Mellish* (7), which seems to be an authority for the claim; there are, however, other authorities unfavorable to it.

March 1st.

Upon the second point there seems to be very little room for doubt. The claim of the executors to the general residue is opposed only upon the ground, that, there

(7) *Pre. Ch.* 31.

1808.

DAWSON

v.

CLARK.

General devise
and bequest
upon trusts;
not sufficient
to exhaust the
whole pro-
perty; a re-
sulting trust
for the heir
and next of
kin.

there is a devise to them of all the testator's property in their individual capacity, upon trust for the debts and legacies; and it is said, that this falls within the case of *Robinson v. Taylor* (8); where, the testator having given all his property upon trusts, that were not sufficient to exhaust the whole, the executors were held trustees for the next of kin. Certainly they were so held in that case; as appears by the *Register's Book*; though not in the Report: but the words in that case were "to my executors hereinafter named:" so it was in the character of executors that they took the property in trust. They had it in no other; and in the same character, in which it was given to them, the trusts were imposed upon them. In that character they could not therefore claim beneficially. There were other expressions, indicating, that the testator considered them as bearing throughout the character of trustees: but here the devise is to the two executors by their names, without any reference whatsoever to their character of executors; with which at that time they were not clothed. There is no connection between the appointment of executors and this trust, in the first part of the Will: nor are there any words, accompanying their appointment, or subsequent to it, which imply, that the testator considered them as subject in that character to any other trust than the law imposed upon them, or as having any other interest than that, which the law gives them. They are therefore entitled to the residue for their own benefit.

The question then is, whether in that residue the 1200*l.*, given to the Charity, be included. I have always understood, that a general residue of personal property comprehends

The general
residue of per-
sonal property
comprehends

(8) 2 Bro. C. C. 589.

every thing, not otherwise effectually disposed of; and no difference, whether a legacy falls into it by lapse, or as void at law: the next of kin therefore excluded by an express bequest of the residue.

comprehended every thing, not otherwise effectually disposed of by the Will; and that there is no difference, whether a legacy falls into it by lapse, or as being void at law; and it was not much contended, that, where there is an express bequest of the residue, the next of kin can be entitled to any thing. It is however supposed, that there is a distinction between residuary legatees, by express bequest, and executors, taking a residue, undisposed of. I am not able to find, any such distinction. It lies upon those, who insist upon it, to shew, that it is established. I see, that in the case of *Pratt v. Sladden* (9) I declared my opinion, that executors, taking the residue, take it precisely in the same plight as residuary legatees would take it; and to that opinion I still adhere.


1309.
DAWSON
v.
CLARK.

Executors
take the residue, precisely
in the same
plight as residuary legatees
would take it.

The cases, referred to, seem to me to have no bearing upon this. In *Arnold v. Chapman* (10) the heir at law was declared to be entitled. In *The Attorney General v. Tomkins* (11), and *The Attorney General v. Lord Winchelsea* (12), the residue was originally given away from the executors.

The case of *Turner v. Ogden*, as cited by me (13) in the argument of *Pickering v. Lord Stamford*, may appear to warrant a different inference; where leasehold estate, given to Charity, having been declared by Lord *Kenyon* to belong to the executrix, was on a re-hearing decreed by Lord *Alvanley* to belong to the next of kin. But, when the facts of that case are stated, the decision will not appear to have the least reference to the general point; but to have been founded entirely upon the particular

(9) Ante, Vol. XIV, 193; (11) *Amb.* 216.
see page 199, 200. (12) 3 *Bro. C. C.* 373.
(10) 1 *Ves.* 108. (13) Ante, Vol. III, 333.

1809.

 DAWSON
 v.
 CLARK.

ticular provisions of the Will. The whole produce of the personal estate was given to the wife for life; and after her death some leasehold property, called his "housen" was given to certain charitable purposes. Particular legacies were given to nine relations; and the residue was also given to them; with a declaration, that they should have nothing to do with his "housen." A suit was instituted after the death of the wife; when the question arose as to the leasehold estate; which could not go to the Charity. Lord *Kenyon's* Decree, that it should go to the executrix, must have gone upon the ground of the express exclusion of his relations. The reasoning was, that as they were to have nothing to do with "the housen," the residue they took was a special residue; out of which "the housen" was expressly excepted. The question then was between the executrix and the next of kin. Lord *Kenyon* decided in favor of the executrix. Lord *Alvanley* conceived, that the executrix was by the terms of the Will excluded from every part of the residue; and that the leasehold must therefore go to the next of kin. I had, in the argument, supposed him to have made a distinction between lapsed and void legacies. But he himself in the judgment (14) states the difference between Lord *Kenyon* and him to have been only, whether there were words of exclusion, sufficient to shew, that the executrix was not intended to take beneficially. This case is therefore an authority for the claim of the executors: Lord *Kenyon* having decided in favour of it, and Lord *Alvanley* having differed from him only with respect to the import of the terms of the particular Will.

Being of opinion, that the executors take the whole residue, including the 1200*l.* the Bill must be dismissed (15).

(14) Ante, Vol. III, 338. *Nourse v. Finch*, ante, I, 344,

(15) Affirmed on Appeal, and the note, 362.
 post, Vol. XVIII, 247, see

WILLIAMS v. WILLIAMS.

1808.
Dec. 10th, 12th,
19th.

THE Bill stated, that by indentures of lease and re-
lease, previous to the marriage of *Daniel Wil-*
liams and *Catherine Prosser*, dated the 7th and 8th of
October, 1777, in consideration of a portion of 1000*l.* &c.
Daniel Williams conveyed to trustees and their heirs a
dwelling-house, called *Little Wonastow*, and several
parcels of land, arable, meadow, pasture, wood, and
underwood, thereunto belonging, and other premises,
to hold to the said trustees and their heirs to the use
of *Daniel Williams* and his heirs, until the marriage,
and, after the solemnization thereof, to the use of *Daniel*
Williams and his assigns for his life without impeach-
ment of waste; with remainder to the use of the trus-
tees and their heirs during the life of the said *Daniel*
Williams, upon trust to preserve the contingent re-
mainders; but to suffer the said *Daniel Williams* and his
assigns during his life to receive the rents, issues, and
profits, of the said hereditaments and premises, for his
and their own use and benefit; with remainder to the
use of *Catherine Prosser* and her assigns for her life
for her jointure and in bar of dower; and, after the
several deceases of *Daniel* and *Catherine Williams*, with
remainder to the use of the first son of the said *Da-*
niel


Settlement,
on marriage,
of lands of the
husband to the
use of hus-
band for life
without im-
peachment of
waste: remain-
der to trustees
to preserve
contingent re-
mainders: re-
mainder to the
wife for life,
for her joint-
ture, and in bar
of dower: re-
mainder to the
first and other
sons of the
marriage in
tail male: re-
mainder to the
daughters in
the same man-
ner: remain-
der to the

heirs of the body of the husband and wife. The husband being dead
without issue, as to the right of the widow to cut timber, and, which
would be a consequence, to the property in it, when severed, as
tenant in tail after possibility of issue extinct, either in possession,
by the effect of merger, if the estates can unite, or, if not, in
remainder, *Quære*.

A case directed (16).

(16) See the note (43), post, 432.

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niel and Catherine Prosser, and the heirs male of the body of such first son; and in default of such issue, to the use of the second, third, fourth, fifth, sixth, and every other, son and sons, severally, successively, and in remainder, and of the several and respective heirs male of the body and bodies of all and every such son and sons; and, in default of such issue, in the same manner to the use of the first and other daughters, and the several and respective heirs male of their bodies; and, in default of such issue, to the use of the heirs of the bodies of the said *Daniel Williams* and *Catherine Prosser*; and, in default of such issue, to the use of the right heirs of *Daniel Williams* for ever.

The settlement contained a proviso, that it should be lawful for *Daniel Williams* during his life, and after his decease for *Catherine Prosser* during her life to make leases, not exceeding twenty-one years, in possession and not in reversion; so as no such leases by any express words therein contained should be made dispunishable of waste.

Daniel Williams by his Will, dated the 5th of February, 1803, devised, from and after the decease of *Catherine Williams* all his estates, which were settled by him upon his said wife for her life previous to their marriage, unto his nephews, their heirs and assigns for ever, as tenants in common.

Daniel Williams died in 1804 without issue; leaving his widow, surviving him, and his eldest nephew, one of the devisees, his heir at law.

The Bill was filed by the two nephews and devisees of *Daniel Williams* against his widow; stating, that she, claiming to be entitled on the provision of her husband
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under the settlement, to an estate in tail after possibility of issue extinct, entered upon the settled estates; and cut timber. The Bill prayed an account of the timber cut, and a perpetual injunction.

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The Defendant put in a demurrer, and a Motion was made for an Injunction.

Sir *Samuel Romilly* and Mr. *Bell*, in support of the Demurrer, contended, first, that the Defendant was tenant in tail after possibility of issue extinct: secondly, that she was entitled to cut timber. The case was argued for the Plaintiffs by Mr. *Hart* and Mr. *Phillimore*. The principal authorities cited were *Herlackenden's Case* (17), *Lewis Bowles's Case* (18), *Abraham v. Bubb* (19), and *Garth v. Cotton* (20). It was stated, that the distinction between a jointress and any other tenant in tail after possibility of issue extinct is not noticed except in the case of *Cook v. Winford* (21); which case is not to be found in the *Register's Book*; and would not now be followed: the reason assigned, that tenant in tail *ex Provisiōe viri*, within the Statute (22), being restrained from parting with the inheritance, cannot therefore fell timber, which is part of it, applying equally to tenant for life without impeachment of waste; and another account of the same case (23) states the injunction to have been "against wilful waste in the site of the house and against pulling down houses." It was also observed, that some passages

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| (17) 4 Co. 62. | (21) 1 Eq. Ca. Ab. 221. |
| (18) 11 Co. 79. See Co. Lit. 28. | 14 Vin. Inj. 426. |
| (19) 2 Show. Rep. 69. | (22) Statute 11 Hen. VII, c. 20. |
| 2 Freem. 53. 2 Eq. Ca. Ab. 757. | (23) <i>Cooke v. Whalley</i> , 1 Eq. Ca. Ab. 400. |
| (20) 1 Dick. 183. 3 Atk. 751. 1 Ves. 524, 546. | |

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passages in the older cases are not intelligible: for instance, the third point (24) in *Lewis Bowles's Case*.

The Lord Chancellor, agreeing that the passages, referred to, in *Lewis Bowles's Case*, were expressed in terms very singular and not easily understood, remarked the distinction between the limitations in that case and in this: there the husband and wife, having an estate tail in possession, subject to open, and let in the remainders, upon the birth of issue, might before the birth of issue have cut timber; and were answerable to no one: they might have barred the contingent estates: but in this case, a trust to preserve contingent remainders being interposed, the estate for life is not merged: the trustees might collect the produce of the timber cut for the son: the widow, never having been tenant in tail in possession, has become tenant in tail after possibility of issue extinct in remainder; and the two characters are so distinct, that, as it is laid down, if tenant in tail in possession, having brought an action, becomes tenant in tail after possibility of issue extinct, the action is gone.

Sir *Samuel Romilly*, in reply, admitting the distinction, pointed out by the *Lord Chancellor*, between the limitations, observed, that the decision in *Lewis Bowles's Case* appeared to proceed upon a different ground; that at the time of severance the wife had an estate for life; with an immediate remainder to herself in tail after possibility of issue extinct; which estates were considered as incapable of uniting: a situation, resembling that of this Defendant; and it is difficult to support a distinction upon the circumstance, that the wife at a former period had a greater estate; during which the severance did not
 take

take place. In *Williams v. Day* (25), the Lord Chancellor declared, that he would stop pulling down houses, or defacing a seat, by tenant after possibility of issue extinct; or by tenant for life, who was dispunishable of waste, by express grant, or by trust,

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The implication from that is, that such tenant is not restrained from waste of any other description.

The Lord CHANCELLOR.

The question, that has been agitated in this case, is, whether, taking the Defendant to be tenant in tail after possibility of issue extinct, she is dispunishable of waste; and, if so, whether she would be entitled to the property in the trees, which she proposed to cut. The case was argued with reference to *Lewis Bowles's Case* (26), *Bowles v. Berrie* (27), which is the same case; and several others; applying to persons, answering that description of tenant in tail after possibility of issue extinct. The situations of such persons may be extremely various: first, a woman may be tenant in tail after possibility of issue extinct of an estate, which was her own, or the estate of her ancestors, in possession: she may also be such tenant of an estate, that was, not her own, but the estate of a stranger, settled upon her and her husband and the heirs of their bodies: or she may be such tenant of an estate, as it is called, *ex Provisione viri*: i. e. of some estate, settled by her husband, or some ancestor or relation of his; and there is no doubt, under the Statute of Jointures (28) an estate tail may be created

Dec. 19th.

Instances of
tenant in tail
after possibi-
lity of issue
extinct; in
possession, or
of a remainder
or reversion.

subject

(25) 2 Ch. Ca. 32.

(28) Stat. 11 Hen. VII.

(26) 11 Co. 79.

c. 20. 27 Hen. VIII. c. 10.

(27) 1 Rol. Rep. 177.

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subject to the restrictions as to alienation there mentioned. But a person may not only, being tenant in tail in all these various ways of an estate, in possession, become tenant in tail after possibility of issue extinct; but may also be tenant in tail after possibility of issue extinct of a remainder or reversion. Lord *Coke*, I think, says so, expressly (29).

In discussing this case it is to be considered, which of these characters belongs to the Defendant; and what are the incidents and privileges belonging to the estate, which she has. In *Lewis Bowles's Case* the limitation was to the husband and wife for their joint lives; and both of them, as the joint estate was so expressed, were unimpeachable of waste; with remainder to the male issue of the marriage; under which limitation the issue were purchasers; and there is a limitation to the heirs of the body of the husband and wife, with remainder over; and it was held, that until issue born they were tenants in tail in possession; though the limitation to them was expressly for their lives without impeachment of waste: yet they had an estate tail, with all its incidents, until severance by the birth of issue; upon which event, having been tenants in tail before, they became tenants for life without impeachment of waste; with remainder to their issue male; &c. Therefore by virtue not only of those words, "without impeachment, &c." but also by virtue of the incidents to the estate tail in possession, there being no trustees to preserve, &c. they might have barred all the remainders behind; and had all the rights of tenant in tail in possession.

There is not one of the cases, that were cited, or have occurred to me, where the reasoning was applied
 to

to this point, whether tenant in tail after possibility of issue extinct was dispunishable of waste; and, if so, had the property in the trees, in which the party had not been tenant in tail in possession. There are cases, where both with reference to a gift in frank-marriage, and an estate tail, created upon other occasions, it was held, that a person might be tenant in tail after possibility of issue extinct of a reversion or remainder: but the question of the rights of such tenant did not come into discussion; except as it might be affected by the reasoning in the case of tenants in tail after possibility of issue extinct, who had once been tenants in tail in possession. This Defendant never was so: the limitation being to her husband for life; then to trustees to preserve contingent remainders, which keeps separate the estates of the husband and wife, even if there were not separate limitations; then to the wife for life; and, the estate of the trustees supporting the limitation to the issue, the joint limitation to the heirs of the bodies of the husband and wife would not unite with the separate estates, limited to the husband and wife. Therefore after the execution of this deed, if the husband had cut timber, it would not have been in right of any estate, vested in him and his wife, or any estate of inheritance in him, but by his title to consider himself dispunishable of waste; and upon *Herlackenden's Case* (30), *Lewis Bowles's Case* (31), and all the authorities, I take it to be settled law, that, where there is tenant for life without impeachment of waste, being dispunishable, he has also the property in the trees severed.

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Tenant for life without impeachment of waste, being dispunishable, has also the property in the trees severed.

It is obvious, that the intention of this settlement could not be, that the wife should have the power of cutting timber.

(30) 4 Co. 62.

(31) 11 Co. 79.

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timber. The inference from the estate for life, given to the husband, expressly without impeachment of waste, and the estate for life to her for her jointure, in bar of dower, without those words, is, that it would be a surprise upon the grantor, if the circumstance of the limitation to her, as one of the donees in tail, would give her that power, which evidently she was not intended to have: if however that power is an incident to her estate, as tenant in tail after possibility of issue extinct, it must take place. The question therefore upon that is, whether this Defendant is in the situation of the widow in *Lewis Bowles's Case*: supposing that case to establish, that the widow in such circumstances is not only dispunishable of waste; but, has the same right and property in the timber as a tenant for life unimpeachable for waste by express contract.

I use the expression "supposing that case to establish that;" as in the case of *Abraham v. Bubb* (32) that is controverted; and the Court is made to say, as the reason of the distinction, that "in the case of tenant in tail after possibility of issue extinct, that is the provision of the Law only; and though in some cases *fortior est dispositio legis quam hominis*, yet that shall not be to incumber estates."

The reasoning of *Lewis Bowles's Case* (33) both in *Coke* and in *Roll* throws great doubt upon the question, whether, supposing the tenant in tail after possibility of issue extinct, having been once tenant in tail in possession with the other donee, would be entitled to what this Defendant claims, the same Law applies to the case,

(32) 2 *Freem.* 53. 2 *Show.* (33) 11 *Co.* 79. 1 *Roll.*
Rep. 69. 2 *Eq. Ca. Ab.* 757. *Rep.* 177.
 See 2 *Freem.* 54.

case, where the wife, surviving, never had any estate, except an estate tail in remainder. The proposition appears singular, that, being tenant for life, impeachable, by express limitation, with remainder to herself, as surviving donee in tail, and remainders over, the life estate not merged in the other (34), which, though different in quality, is not larger, by virtue of that other interest, differing, not in quantity, but in quality, if she cuts timber, it shall be her property. That is not the necessary inference from those cases.

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Upon the question, whether, if dispunishable by the provision of the Law, she has equally with tenant for life without impeachment of waste by settlement an interest and property in the timber, I think she has the same interest, as if she was so entitled by the provision of a settlement; and whatever may be the doctrine upon *Herlackenden's Case* (35), *Lewis Bowles's Case* and others, notwithstanding the controversy in Lord *Nottingham's* time, being dispunishable, she has, as a consequence, the property in the trees; and I cannot imagine, how that is doubted in *Abraham v. Bubb*. It is very singular, that there should be argument here, that such a tenant, &c. should be restrained from committing malicious waste, by cutting ornamental timber, &c. if it was understood to be the Law, that she could not commit waste of any kind. These cases therefore prove, that, if dispunishable of waste, she would have the property in the trees cut; But upon what is laid down in *Lewis Bowles's Case*, and more strongly in *Roll*, upon the effect of what she could once do by virtue of the inheritance, that was once in her,

Tenant in tail after possibility of issue extinct, being dispunishable for waste by the law, has, equally with tenant for life without impeachment of waste by settlement, an interest and property in the timber,

and

(34) *Colson v. Colson*, 2 tenant in tail after possibility of issue extinct sells trees, the lessor shall have them.
Atk. 246, 247. Cited 1 *Ves.* 147.

(35) 4 *Co.* 62; see folio 63, where it is said, that, if

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and therefore of what she might continue to do, it is not a necessary consequence, that a person, in the situation of this tenant in tail, shall have the same privileges and rights, if they are put as the effect of circumstances, that do not belong to her character.

Lord Coke in *Lewis Bowles's Case* states (36) first, that the estate for life would not merge: secondly, that the "wife should have the privilege of tenant in tail after possibility for the inheritance, which was once in her;" that she might be tenant in tail after possibility of a remainder as well as of a possession; and, if the tenant for life surrenders, she is tenant in tail after possibility in possession. He proceeds to state, that it was observed, that tenant in special tail at the common Law had a limited fee-simple; and, when their estate was changed by the Statute *de Donis Conditionalibus*, yet there was not any change of their interest in doing of waste: so, when by the death of one donee without issue the estate is changed, yet "*the power*" to commit waste, "*and to convert it to his own use*," (strong and remarkable words) is not altered, or changed, for the inheritance, which was once in him.

The meaning is, that, as they had once the power of committing waste, and of converting the timber to their own use, (which expression seems to admit, that the property in the trees cut would go along with the power to commit waste) so, when by the death of one of these donees the estate tail was altered, yet that power should not be altered: nevertheless putting the future existence of that power, as the present existence of it, upon the estate tail in possession.

Lord

Lord Coke afterwards, citing *Littleton* (37), puts this case. Feoffment upon condition, that the feoffee shall give lands to the feoffor and to the wife of the feoffor; to have and to hold to them and the heirs of their two bodies begotten: the remainder to the right heirs of the feoffor: the husband dies, leaving the wife, before any estate tail made to them: then ought the feoffee to make an estate to the wife as near the intent of the condition as he can; viz. for her life without impeachment of waste: remainder to the heirs of the body of her husband upon her begotten: remainder to the right heirs of the husband; and the reason given is, that, if the feoffment had been made according to the condition, she would have had the inheritance; and to it would be annexed the power of committing waste: and Lord Coke states this case as directly proving, that tenant for life without impeachment of waste has as great a power to do waste, and to convert the property at his own pleasure as tenant in tail had. These two passages point to my distinction; and also shew that, where there is the power, there is also the beneficial interest in the exercise of that power.

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The Report of that case in *Roll* has much more the appearance of conversation than judgment; and I confess I do not understand several parts of it. There are however many passages, pointing to the same distinction; that (38) tenant in tail after possibility of issue extinct is not punishable for waste on account of the estate of inheritance, which was once in him; referring to the Year-Book of *Henry IV.* (39); and again, that he is punishable "for the fee, which was once in him;" citing the Year-Book of *Henry VI.* (40); that he shall not have aid,

(37) *Lit. Sec.* 352. 11 *Co.* 83. (39) 11 *Hen. IV.* 16.
(40) 10 *Hen. VI.* 1.
(38) 1 *Roll's Rep.* 184.

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aid, nor be punishable in waste, by virtue of the livery upon the estate tail. Then *Littleton* says, there can be no tenant after possibility except one of the donees, parties to the livery; at which time he had full power of disposition of the trees; referring to Doctor and Student (41).

From this I collect, that the distinction I have stated is upon a question of this nature most material. The expression in the Year-Book of *Henry VI.* "and he "dispunishable by reason of the fee; which was once "is in him," seems to me to be explained by this; that according to the old doctrine of the law the tenant in tail was tenant in fee: but those words could not in any sense apply to a mere tenant in tail in remainder; who could not be represented as having the fee in him in the sense there intended. It is impossible to maintain, that, when this estate in remainder was created, the persons, claiming under that remainder, could, taking all the limitations together, have full power to dispose of the trees.

These authorities suggested to me the necessity of looking at the farther cases; and there is not one, in which tenant in tail after possibility of issue extinct, having been once tenant in tail in possession with the other donee, and therefore dispunishable for waste, may, not only com-

These authorities suggested to me the necessity of looking at the farther cases; and there is not one, in which tenant in tail after possibility of issue extinct is said to be dispunishable of waste, where that tenant had not once been tenant in tail with the other donee in possession. The reasoning, assigned to prove, that such person is dispunishable, seems to have a strong connection with the fact, that such person was once tenant in tail in possession with the other donee. If such tenant is dispunishable, I collect, that at law she would have power,

(41) *Doct. & Stud. Dial. 2. Ch. I. 114, 15th edit.*

mit waste, but also convert to her own use the property wasted. Therefore not to be restrained in Equity, except for malicious waste.

power, not only to commit waste, but also to convert to her own use the property wasted. If she had that power at law, I do not see, why she should be restrained in equity. Courts of Equity have actually restrained only malicious waste; and, if it had been conceived, that she could not commit ordinary waste, such a Judge as Lord *Hardwicke*, as able a lawyer as ever sat in this place, would scarcely have cited all those authorities in the case of *Garth v. Cotton* to prove, that she could not commit malicious waste.

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But my difficulty is, what is at law the situation of a person, claiming in remainder after the death of the joint donee in such a settlement as this; and I cannot go the length of holding, that she should be at liberty to cut timber, until this subject shall either have been farther considered at law in a case, or again argued before me, with the assistance of two of the Judges. I am satisfied, that this case is not governed by any thing, that has been decided.

A case was sent to the Court of King's Bench: the demurrer standing over; and the Defendant undertaking not to cut timber.

The Lord CHANCELLOR, observing, that it was extremely difficult upon the cases to say, whether the Defendant was tenant in tail after possibility of issue extinct, many passages being unintelligible, and that one very material consideration for the Court of Law would be, whether the estate for life was merged, or not (42), directed, that she should not be described as tenant in tail after

(42) *Colson v. Colson*, 2 *Atk.* 246, 247. Stated by Lord *Hardwicke*, 1 *Ves.* 147, in *Bagshaw v. Spencer*.

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after possibility of issue extinct; but, that the limitations should be stated: the question to be, whether she has a right to cut timber (43).

(43) The Certificate, of the Court of King's Bench upon the argument of this case was, 1st, that *Catherine Williams* is p^rimpeachable of waste upon the estate and premises comprised in the said indentures of Lease and Release or settlement in the Bill mentioned: 2dly, that, having cut timber thereon, she is entitled to the timber so cut as her own property; and 3dly, that the said Defendant became tenant in tail after possibility of issue extinct: 12 *East*, 209. Mr. *Madock*, vol. iii. 519, observes, that it would have afforded great satisfaction to the Pro- fession, if the Judges had given the reasons for their Certificate; which has not been unusual. It is peculiarly to be regretted, that upon a subject, involving such abstruse doctrine, the *Lord Chancellor*, having in a very able discussion of old and obscure authorities, well justified the doubts, requiring his Lordship to call for the assistance of a Court of Law, obtained no more information than could be collected from short, dry, answers; one of which is expressed in ambiguous terms, neither following the question, nor meeting the difficulty.

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Aug. 8th.

Dec. 19th.

LUPTON v. WHITE.
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Agent, or Bailiff, confounding his principal's property with his own, **T**HE Bill, upon which the first of these causes was instituted, praying an account of lead ore, obtained under premises, called *The Little Ing*, in the manor

charged with the whole; except what he can prove to be his own; and, in this instance, the case of a breach of the terms, upon which the Court dissolved an Injunction, the inquiry was directed with costs.

The Court refused in such a case a prospective direction to admit books, not legal evidence; usual in a fair case; as, where from want of notice of an adverse claim a strict account cannot be given; merely giving liberty to apply upon any question of evidence.

manor of *Beverley* in *Yorkshire*, claimed by the Plaintiff, as his estate; and an injunction against continuing to work the mine. The Defendants were the owners of considerable lead mines adjoining, and lessees under him; contending, that *The Little Ing*, which did not contain more than four or five acres, was comprehended in the leases. An injunction, having been obtained, was dissolved upon the undertaking of the Defendants, that, being permitted to continue to work the mines, which had been worked together, as one mine, distinct accounts should be kept of the ore, produced from under *The Little Ing*. An issue was directed; and the verdict having established the Plaintiff's title to those premises, an account was directed of the lead ore, &c. got by the Defendants in the first cause under the close, called *The Little Ing*. The Master's Report stated, from the affidavit of the Defendant *White*, that the other Defendants were lessees under him, or otherwise concerned as partners in the *Prosperous Mine*, also situated in *Beverley*, rendering a certain duty in lead to him, as rent; * that they were at the entire risk and whole expence of working that mine; and consequently the books of account, &c. were in their custody.

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The Report farther stated from the affidavit of *Findlay*, one of the Defendants in the first cause, that two books of account produced were the only books kept for entering the general accounts of the lead mines, including *The Little Ing*; and that all the ore, which during the years 1802, 1803, and 1804, were got in *Prosperous Mines* and under *Little Ing*, was brought up through the shafts and levels of, and smelted and sold, as belonging to the *Prosperous Mine*. Two of the lessees stated, that, before they entered upon any working within the limits of *The Little Ing*, they were apprehensive from the threats of *Lupton*, that some dispute might probably arise as to their right of getting

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minerals there: but, as the minerals within *The Little Ing* were comprised in their lease, they carried their workings into it; and continued them, until the first injunction was obtained; in consequence of which they desisted, until that injunction was dissolved; and upon renewing their workings they had the caution to direct their agent to lay into separate heaps, and to keep a distinct account of, all the minerals, that should be raised from *The Little Ing*, and to inform the smelters, which was the particular ore, which came from that ground; that they might distinguish it.

[ \*434 ]

The Master stated his opinion upon all the books produced, that the Defendants have not rendered a true account of the lead, got from *The Little Ing*; and that the account of sales of lead in the book, entitled "The Accounts of *Little Ing*," and several other books produced, have been so kept or contrived as to prevent a true discovery, as well of the ore, got by the Defendants *Wood* and *Co.* from under *Little Ing*, as of the lead produced therefrom; and that for the purpose of preventing a discovery of the ore, got from under *Little Ing*, and of the lead produced therefrom, the Defendants *Wood* and *Co.* caused the ore, got from *The Little Ing*, to be mixed with the ore, got out of their adjoining mine; and the ore from both mines was smelted together at the same hearth, and marked with the same mark and letter; that in payment of the duty in lead to the Defendant *White* no distinction was made between the lead, arising from the ore, got from one mine and the other; and, in order to prevent a proper examination of the workings under *Little Ing*, the Defendants permitted some of the workings to fall in; wilfully filled up other parts with rubbish; and drowned the lower part: so that no true estimate could be formed of the quantity of ore, got by the Defendants *Wood* and *Co.* from or under *Little Ing*; and under all the circumstances and upon

upon all the evidence, the Master stated, that he found it impossible to take an account with any degree of accuracy of the ore, &c. got under *The Little Ing*.

Exceptions were taken to the Report; on the ground, that the Master had not charged the Defendants with the sum of 23,986*l.* 9*s.* 6*d.*; received by them as the value or produce of lead, which under the circumstances, proved before the Master, ought to have been made from the ore, got by them from under *The Little Ing*.

Sir Samuel Romilly and Mr. Bell, in support of the Exceptions.

The point, maintained by these Exceptions, is, that the Defendants ought to have been charged with the whole produce of these mines; leaving them to discharge themselves by shewing, what was the produce of their own mine; upon the principle, that every presumption is to be made against an agent, who by his tortious Act has made it impossible for the Plaintiff to distinguish his property: a principle, that has been frequently acted upon.

In the case of *Panton v. Panton* (44) the Defendant remitted considerable sums, the property of the Plaintiff, with money of his own, to an agent in *London*, to be laid out; and the securities were changed for the purpose of misleading, and making it impossible for the Plaintiff to distinguish his property: part being clearly the property of the Defendant. The Court held, that it was upon him to distinguish, what was his own; and an issue was directed; with the affirmative upon him: but, a compromise taking place, it was not tried. Upon the same principle is *Armory v. Delamirie* (45): the case of a diamond

(44) In the Court of Exchequer.

(45) 1 *Str.* 505.

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[ \*435 ]

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a diamond ring, found by a poor boy; and a jeweller, taking out the stone, and giving him a trifle, the jury were directed to give the amount of the most valuable diamond. Your Lordship in the case of *Mr. Jackson's* executors (46) acted upon a similar principle.

[ \*436 ]

This case has farther the peculiar circumstance, that these Defendants, in consideration that the injunction should be dissolved, and they should be permitted to proceed with their works, undertook to the Court, that the accounts should be perfectly clear and distinct. The effect of that undertaking is, that they were bound by contract to the Court to consider themselves as bailiffs: yet they have not only not kept distinct accounts of the ore \* produced, but by suppressing and fabricating evidence and other management have deprived the Court of all means of having distinct accounts.

Sir *Arthur Piggott*, Mr. *Richards*, Mr. *Wear*, and Mr. *White*, for the Defendants, contended, that the proposition is extravagant, that, as the ore, produced from the Plaintiff's mine, has been mixed with the produce of the other, the Plaintiff should have the whole.

*The Lord CHANCELLOR.*

The Master's Report, stating, that he cannot take the account, which has been directed, is the subject of farther directions, rather than of Exception. The account was directed upon a familiar principle of equity; though the object might have been obtained in an action for mesne profits, or trover. An inquiry before a jury having ascertained satisfactorily, that the Plaintiff is entitled to what was under these premises, the Court was bound to enjoin the Defendants from proceeding: or, permitting

(46) *White v. Lady Lincoln*, *Newcastle*, ante, Vol. VIII, *Kinderley v. The Duke of* 363.

permitting them, with reference to the convenience of both mines, to proceed, that could be allowed only upon their undertaking to keep an account; and then they cannot be heard to say, they could not keep it. If the account does not satisfy the object and intention of that undertaking, it is not a compliance with the condition in that rational sense, in which it must be understood. If the result is, that the Master cannot take the account, it is clearly not for him, without a farther direction, to apply the great principle, familiar both at law and in equity, that, if a man, having undertaken to keep the property of another distinct, mixes it with his own, the whole must both at law and in equity be taken to be the property of the other, until the former puts the subject under such circumstances, that it may be distinguished as satisfactorily, as it might have been before that unauthorized mixture upon his part. There may be cases, in which the Master may charge parties upon that principle: but it must be under the direction of the Court; who will judge, whether the case is proper. I agree entirely with the Master, that under these circumstances he cannot take such an account as this Decree calls for. The consequence is, that upon farther directions it must either be referred back to the Master, with a direction to guide him as the mode of charging the Defendants, where he cannot take the account satisfactorily; or an issue must be directed; taking care not to overlook the principle I have mentioned; which throws the proof upon the Defendants.

Therefore I shall not allow these Exceptions; but without prejudice to what the Court may think proper to do upon farther directions.

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The cause being heard for farther directions, the same question was again argued: the Defendants pressing for a special

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a special direction to the Master to receive the books in evidence.

The Lord CHANCELLOR.

This case comes before me under circumstances, in some respects different from any, which the Court has hitherto had to deal with in cases of a similar nature. The Defendant *White*, as far as he is concerned, is involved in it simply in consequence of his own undertaking. No misconduct, no fraud, are imputed to him. He is culpable, not morally, but only for having applied too little attention to his own interest. With regard to the other Defendants, this is a case of great * and serious importance; especially with reference to the example, which the Court is to furnish; and in my view of transactions of this nature a Court of Equity ought to go to the extent of all, that is just, (and beyond that no Court ought to go) to restrain persons from dealing with the property of others, as these Defendants have dealt with the property of this Plaintiff.

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An injunction having been obtained, the Court refused to relieve the Defendants against it, unless they would lay themselves under an obligation, which would prevent those difficulties, that had obstructed the administration of justice between these parties. With that view, upon an application to dissolve the injunction, the Court refused to interfere, except upon terms: accordingly, the Defendant *White*, who seems to have placed more confidence in his lessees and agents than they deserved, and the other Defendants, agreed to the terms proposed; that, as it would be inconvenient to their concerns, entangled as they had been with the working of the mines, claimed by the Plaintiff as his inheritance, to discontinue working, as they had done, if the Court would permit them to work under *The Little Ing*, they would account fully for all they should take from it, if it should appear, that

that the soil, and the mines under it, were the inheritance of the Plaintiff. They stand before the Court upon the faith of that undertaking; which they were bound to make good; as if a Receiver had been appointed, or the injunction continued; and these parties are to be considered, not as man acting towards man, but with reference to an undertaking by one man to leave the other as safe, as if the protecting hand of this Court had been over him.

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A verdict has determined, that *The Little Ing* is the close of the Plaintiff; and it is now therefore established, * that after the injunction issued these Defendants had taken the Plaintiff's property. The necessary consequence is, that all, which has been taken, has been taken by wrong; that of all, which has been taken, since the injunction was dissolved, a clear account ought to be rendered: an account, free from difficulty. The account was prayed, and granted, accordingly; with the proper directions as to allowances and costs, which justice between parties under such circumstances prescribed; and that has produced this Report; establishing the facts, that, the Defendant *White* imprudently considering himself as having no concern with it, taking no care, that what had been wrongfully obtained was made good, but placing a most unwarranted confidence in his agents and lessees, the thing proceeds in such a way, that books were fabricated; the produce of the different mines mixed; no distinct accounts kept; workings allowed to fail in; and cavities filled up: so that I have no means of charging the Defendants with the fair amount of what they have taken; and the Master, speaking of the evidence, represents, that by contrivance it has become impossible to discover, what would be the result of a fair and just account of the produce of *The Little Ing*.

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Corresponding with the rule in Equity [*440] ty to charge an accounting party, who has wilfully confounded the fund with his own property, with the whole, throwing upon him the discharge, in instances at law, where the Defendant having wilfully prevented the Plaintiff's proving the real value of his property, damages to the utmost value the article could bear were given: whether that should have been carried far beyond the possible value, *quare*.

What then is the conclusion? If a man by his own tortious act makes it impossible for another to ascertain the value of his property, and that in a transaction, in which the former was, not merely under an implied moral obligation, but pledged by a solemn undertaking in a Court of Justice, that such should not be the state of things between them, by those means preventing the guard, which the Court would have effectually interposed, is the argument to be endured, that, as the party, so injured, cannot distinguish his property, therefore he shall have nothing? That is not the law of this country; as administered in Courts either of Law or Equity. The case (47) of the diamond ring, found by a poor boy, proves the contrary. He had not the means of shewing the value. The person who took it from him, by wrong, prevented the jury from ascertaining the value by production of the ring, or other evidence. Therefore, as it was proved, that the Plaintiff's evidence had been destroyed by the act of that person, who ought to have refrained from placing the transaction in that state, the Lord Chief Justice directed the jury to find, that the stone was of the utmost value they could find; upon this principle, that it was the Defendant's own fault, by his own dishonest act, that the jury could not find the real value.

The case of *Panton v. Panton* (48) applies to this. A clerk in a banking-house at *Chester* remitted his own money, with that of his employer, to an agent in *London*, to be laid out upon security; and by management he securities were so changed, that the property could not be distinguished. The Court of Exchequer held, that, the confusion being occasioned by him, who so dealt with the property, the distinction lay upon him; and,

(47) *Armory v. Delamirie*,
1 *Str.* 505.

(48) In the Court of Exchequer.

and, if he could not distinguish, what was his own, the whole must be considered as belonging to the other.

A principle, not dissimilar, though not precisely the same, governed me in the case of *Mr. Jackson's* executors (49). There was no more duty imposed upon him * than upon these individuals. He had kept the account, and, as it appeared to me, not incorrectly, upon his own side: but, having kept it only upon his own, though bound to keep it upon the other, side, it was held, that he could not maintain a demand, to which under other circumstances he would have been fairly entitled. The decision was made, not upon the notion, that strict justice was done, but upon this; that it was the only justice, that could be done; and that no more could be done was the fault of *Jackson* himself; who, if he did not enable those parties to know, what demand they had upon him, could not be heard to say, he had any demand upon them.

Upon a principle of the same sort I ventured to go in the case of the late Lord *Chedworth* (50). Some part of the property clearly belonged to *Edwards*, the steward; and I thought myself entitled in the first instance to lay an injunction upon the whole fund. I do not advert to the case (51) of the horse, before Lord *Loughborough*, or to that of the dog, before me, in the Court of Common Pleas; as it is perhaps doubtful, where the law declares distinctly, that the value of the animal shall be given, whether a Judge is justified in directing a Jury to give a sum, far exceeding the real value. Those cases however do not interfere with the others.

This

(49) *White v. Lady Lincoln, The Duke of Newcastle v. Kinderley*, ante, Vol. VIII, 363.

(50) *Lord Chedworth v. Edwards*, ante, Vol. VIII, 46.

(51) *Ante*, Vol. II, 203, 4, *Newman v. Payne*; see the note.

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Case by the  
 old law of a  
 wilful mixture  
 by the owner  
 of corn or  
 flour with that  
 of another: the  
 value being  
 unequal, and  
 therefore not  
 to be distin-  
 guished, the  
 other took the  
 whole.

This Report presents to the Court a case of violation of property, previous to the injunction; giving the right to an account upon ordinary principles. After the injunction was dissolved, the Defendants were permitted to use this mine upon a pledge of good faith to this Court, that a clear account should be produced; and that the Plaintiff should have no difficulty in ascertaining his property. If at the hearing it had been stated to me, that there would be any difficulty, I should probably have said at once, that it should be, not on him, but on the Defendants; and that, if they did not distinguish, what was his, all should be taken to be his. What are the cases in the old law of a mixture of corn or flour? If one man mixes his corn or flour with that of another, and they were of equal value, the latter must have the given quantity: but, if articles of different value are mixed, producing a third value, the aggregate of both, and through the fault of the person, mixing them, the other party cannot tell, what was the original value of his property, he must have the whole (52) and the principle goes to the full extent of what is now contended. Regretting the consequences in this instance to one of the parties, who is made answerable only for inattention to his own interest, I believe, there is no greater violation of property in this country than of property of this nature.

It

(52) Sir William Blackstone observes the distinction between the Civil Law and our Law upon this point: the former, though giving the aggregate to the party, who did not interfere in the mixture, allowing the other a satisfaction for his loss: "but our Law, to guard against fraud, gives the entire property, without any account, to him, whose original dominion is invaded, and endeavoured to be rendered uncertain, without his own consent." 2 Black. Com. 404, 5, referring to *Popham*, 38. 2 Burr. 325. 1 HqL. P. C. 513. 2 Vern. 516.

It is said, if the whole is to be understood to be the produce of *The Little Ing*, except so far as any part can be shewn to be the produce of the *Prosperous Mine*, the effect is to determine, that the whole must be considered as the produce of the former; unless a special direction is given, that these books are to be received \*in evidence before the Master. There are, I admit, many cases, in which this Court, giving an account, directs it to be taken with the admission of certain documents or testimonies, not having the character of legal evidence. If parties have been permitted for a long course of years to deal with property as their own, considering themselves under no obligation to keep accounts, as if there was any adverse interest, having no reason to believe, the property belonged to another, though it would not follow, that, being unable to give an accurate account, they should keep the property, yet the account would be directed, not according to the strict course, but in such a manner as under all the circumstances would be fit. The case however is widely different, where both parties knew, that the property was the subject of adverse claim; and those, who desire to have the rules of evidence relaxed, had undertaken that there should be no occasion for deviating from the strict rule; that there should be clear accounts; that the other party should have his property without hazard of loss from the want, or complication, of accounts. In a case of this nature a previous direction to the Master to receive such evidence would introduce a most dangerous principle. The utmost length I can go in such a case is to give liberty to either party, if the Master in taking the account of the produce of the *Prosperous Mine* shall find difficulty as to receiving any evidence, to apply to the Court for directions upon that particular point. It is perfectly clear, that such a reservation will be necessary as to these books; even not considering the imputation, which is cast upon them

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them by the Master's Report: but the fact, that better evidence will be wanting, is not sufficiently clear to warrant a prospective direction* to the Master to receive them.

*The circumstance, that this difficulty, cast upon the Plaintiff in recovering his right, is the consequence of the breach of an engagement with this Court, binds me to give even this relief, at the cost of the Defendants. I do not mean, that, if any thing culpable should arise before the Master upon the other side, that those costs should be included: but, with that exception, this relief should be given with costs; as it is proper to mark such a case upon the contract of individuals with the Court itself.

The Decree was accordingly made; directing the account; as it was prayed; charging the Defendants with the whole net produce, except what they shall prove to have been taken from the *Prosperous Mine*; with all the costs of that inquiry, except as to any thing, that may occur, blameable on the part of the Plaintiff in the course of it, with costs; and a special direction, that, if any question as to the admission of evidence should arise before the Master in the course of the inquiry directed, either party should be at liberty to apply to the Court for directions upon such point of evidence (53).

(53) Ante, *Lord Hardwicke v. Vernon*, Vol. IV, 411, and the note, 418.

1808.
 Dec. 20th.
 Writ of *Ne exeat Regno*,
 upon a legal
 demand
 against an

GARDNER v. ———.

A MOTION was made for a Writ of *Ne exeat Regno*, to restrain the Defendant, who was an attorney, from going abroad, until he had given security to pay the sum against an attorney, on the ground of his privilege, by analogy to the case of equitable demands, refused.

sum of 69*l.* 15*s.* or to abide the event of an action depending for the recovery of that sum from him for goods sold and delivered. The affidavit stated, that the Defendant had avowed his intention of going to the *East Indies*; and that he had taken his passage in a ship, which was expected to sail in the beginning of *January*.

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GARDNER
v.
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Sir *Samuel Romilly* and Mr. *Heald*, in support of the Motion, admitting, that, with the exception of the case, of a decree for alimony (54), this writ is granted only upon equitable demands, observed, that the reason, that the party cannot be held to bail, applies to the privilege of this Defendant.

The Lord CHANCELLOR, stopping Mr. *Hall*, for the Defendant, said, he had no jurisdiction; and refused the writ (55).

(54) *Ante*, *Shaftoe v. Shaftoe*, 171, 173, 410. *Haffey v. Dawson v. Dawson*, *Oldham v. Oldham*, Vol. VII, *Haffey*, XIV, 261. (55) See the notes, Vol. I, 95; IV, 592.

MOUNTFORT, *Ex parte*.

1808-9.
Dec. 23d.
Feb. 3d.

A PETITION was presented by a male infant, of the age of eighteen; no Bill being filed: the Petition, supported by affidavits, stating, that the petitioner, as heir at law to his grandmother, was entitled to freehold estates, subject to a mortgage; that his father entered for a reference as to maintenance, but not for a Receiver, upon a petition, without any suit instituted (56).

(56) See the note, post, 448.

Order for the appointment of a person to act as guardian (the father being living) and for a reference as to maintenance.

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Ex parte.

tered into possession of the estate; continued to receive the rents and profits, until possession was taken by the mortgagee; applied the rents and profits, received by him, to his own use; that he is in insolvent circumstances; and is so negligent of the interests of the petitioner, that if he shall continue to receive the rents and profits, there is no probability of their being ever applied to the petitioner's use: on the contrary they will be in danger of being wasted and entirely lost to the petitioner.

The Petition, farther stating, that no guardian had been appointed, and that the petitioner has no near relation, except his father, and a sister, under the age of twenty-one, prayed, that *Richard Rutter*, to whom the petitioner had been bound apprentice, may be appointed the guardian of his person and fortune; that a receiver may be appointed; and that a reference may be directed to the Master to consider of a proper allowance for the maintenance of the petitioner during his minority; and that such allowance may be paid out of the rents and profits.

Mr. *Newbolt*, in support of the Petition, mentioned *Kiffin v. Kiffin* (57), and *Butler v. Freeman* (58), as authorities for the interference of the Court against the father; and, as to the appointment of a guardian, and receiver, and making an order for maintenance, upon a petition, without any cause instituted, *Ex parte Whiffeld* (59). *Ex parte Salter* (60). *Ex parte Odell* (61), and *Ex parte Peploe* (62).

The

(57) Cited 1 *P. Will.* 705.

(61) Cited 2 *Atk.* 315.

(58) *Amb.* 301.

3 *Bro. C. C.* 501.

(59) 2 *Atk.* 315.

(62) Cited 2 *Atk.* 315.

(60) 3 *Bro. C. C.* 500.

3 *Bro. C. C.* 501.

2 *Dick.* 709.

The Lord CHANCELLOR.

I have no doubt, that in certain cases the Court will, upon petition, without a Bill, appoint, not a guardian (63), which cannot be during the father's life, but a person to act as guardian; though in modern times the Court has professed to be very cautious upon that: but my difficulty is upon the other point; whether upon petition, where there is no cause in Court, I have any authority to appoint a receiver. I have never in my experience observed an instance of the appointment of a receiver without a Bill; and I believe, it has been recently refused. The late cases upon the appointment of a guardian have been considered as going a great way: and though it was held, that a guardian might be appointed upon a petition, the Court said, they would stay the payment of maintenance, until a Bill should be filed; and that appears in *Ex parte Salter* (64) to have been the concurrent opinion of Lords *Thurlow*, *Rosslyn*, and *Alvanley*; Lord *Thurlow* declaring, that he was borne down by precedent. Lord *Rosslyn* in *The Duke of Newcastle's Case* (65) made the order for a guardian; but stayed payment

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MOUNTFORT,
Ex parte.

(63) Order appointing a guardian without a reference only where the property is excessively small: post, *Ex parte Wheeler*, Vol. XVI, 286, and the references.

(64) 2 *Dick*. 769.

(65) *Thomas*, Duke of *Newcastle*, died upon the 18th of *May*, 1795; by his Will naming four guardians of his children; who were infants: but the Will had only one witness.

Upon the 20th of *June*,

1795, a Petition was presented in the name of the infants for a reference to the Master to approve proper persons to be appointed guardians; and to consider, what would be a proper allowance for maintenance, and education of the petitioner, the Duke of *Newcastle*; regard being had to his rank, dignity, and fortune, and to the scanty income of the Duchess, his mother, and to the circumstances

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Ex parte.

ment of maintenance, until a Bill should be filed; and that was followed by Lord *Alvanley*. I have taken the course to be not to do it upon petition, except in very special cases; as, where there is a specific fund for maintenance: or the property is very small; but that, as a general rule, if the infant had 100*l. per annum*, a Bill should be filed. A very serious question would arise, whether, if the person, so appointed, should embezzle the rents, I should have jurisdiction to commit him to the *Fleet*. I am informed by the Register, that in a late

stances of the other petitioners. On the 4th of *July* a Report was made; approving the persons, named in the Will as guardians; and stating, that the sum of 4000*l. per annum* would be proper for the maintenance. A petition was presented to confirm the Report.

Lord *Loughborough*, C. at first felt some doubt, whether the Order could be made without a Bill. Afterwards the Petition, being altered in some respects, came on again; and upon the 15th of *July* the Order was made accordingly: but the *Register* (Mr. *Dickens*) feeling doubt, whether such an Order could be made *ex parte*, suspended it; and upon the 23d of *July* the Order was varied by direct-

ing the Report to be confirmed as to the allowance of 4000*l. per annum* for maintenance; and the persons, approved as guardians, were appointed guardians; not, as was prayed, generally, but only of the persons of the Petitioners during their respective minorities; and with this variation the Order, containing no directions touching the payment of the allowance for maintenance, was delivered out upon the undertaking of the Solicitor to file a Bill immediately, and put the estate under the direction of the Court.

A Bill was filed accordingly; and Receivers were appointed; who were directed to pay the allowance for the maintenance of the Duke to the Duchess.

late case (66) the *Master of the Rolls* upon great consideration refused the application as to a Receiver.

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MOUNTFORT,
Ex parte.

The Lord CHANCELLOR said, he had consulted the *Master of the Rolls*; and made the Order for the appointment of *Rutter*, to act as guardian of the estate and person of the infant; referring it to the Master to consider of a proper allowance for maintenance; and refusing the Motion as to a Receiver (67).

1809.
Feb. 3d.

(66) *Cherry v. Cherry*, at the *Rolls*, 1801.

A Decree had been made for taking an account of the personal estate, debts and legacies; and for an allowance for maintenance: but the Bill prayed no directions as to the real estate. Upon the 10th of June a petition came on in the Consent Room; praying a Receiver of the rents of the real estate; and it appears by the *Register's Book*, that no Order was made upon that petition.

(67) It appears by the *Register's Book*, that the Order was not drawn up on this application: but soon afterwards a Bill was filed by the infants; and on Motion in the cause a

reference was directed to the Master to approve of a proper person or persons to have the care of the Plaintiffs *John* and *Elizabeth Mountfort* during their respective minorities; to inquire, whether the Defendant *John Mountfort*, the elder, is of ability to maintain the Plaintiffs; and, if not, what is proper to be allowed for maintenance and education of the Plaintiff *John*; and to appoint a proper person to be Receiver, &c. A Report was made under this Order; and confirmed. July 3d, December 11, 1809. *Register's Book*, 1808, B. fo. 718. See *Ex parte Myerscough*, 1 Jac. & Walk. 151, and 1 Madd. Pr. 342, note (1).

1808-9.

BAMFORD, *Ex parte*.

Jan. 11th.

Act of Bankruptcy, committed after retiring [*450] from trade, sufficient.

Act of Bankruptcy by quitting the dwelling-house with the intention of delaying a creditor; though under the impression of a groundless apprehension.

Act of Bankruptcy by denial to a servant, calling for a debt by the direction of the acknowledged agent of the creditor, and by the appointment of the debtor; and though the debtor was seen by the person applying through the window of a partition; and heard, giving directions to deny him.

THE Petition stated, that an issue has been directed to try, whether the Petitioner *Bamford*, after the 27th of *February*, 1807, and before the date and suing * forth of the Commission of Bankruptcy against him, had committed any act or acts of bankruptcy. Upon the trial at the assizes before Baron *Wood* the verdict was in favor of the Plaintiffs, the assignees; and the Judge certified, that it was proved, that the Defendant committed an act of bankruptcy by departing from his dwelling-house between the 5th and 13th days of *February*, 1808; and, that he committed another act of bankruptcy in *Easter* week 1807, by a denial to *Jane Park*.

The departure from the dwelling-house was proved by *James Plowman* and *Richard Hartley*; who stated, that some time in *February*, 1808, they went to the dwelling-house of the Petitioner in *Manchester* about seven o'clock in the morning; and knocked at the door; and soon afterwards through a fan-light over the door saw the Petitioner coming down with a lighted candle in his hand; that soon afterwards the door was opened by a servant; when upon searching the house the Petitioner was not to be found; but that a bed, on which a man's night-cap lay, was warm; and the print of a man's footsteps was discoverable in the snow at the back door, with the heel towards the door. The name of neither *Plowman* nor *Hartley* was in the sheriff's warrant, under which they acted: but it was directed to a sheriff's officer, named *Barrowclough*; who sent them to arrest the Petitioner; and they had been at his house twice the day before. According to the Judge's notes one of them stated, that he was assistant to *Barrowclough*; and had been at the Petitioner's house with that officer to arrest the Petitioner,

tioner, but without success: the other stated, that he has known the Petitioner; and had looked after him for two years; but could never find him.

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BAMFORD,
Ex parte.

The Petition farther stated, that it was proved, that the Petitioner retired from business in *April*, 1807; and insisted, that, when he ceased to be a trader, he ceased to be an object of the bankrupt laws; and that, as the bailiff's followers were not creditors, and had no authority whatsoever to arrest the Petitioner, and could not legally have arrested him, a departure from his dwelling-house to avoid them is not an act of bankruptcy, or evidence of an act of bankruptcy.

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The Petition then stated the evidence of the denial, proved by *Jane Park*; who stated, that she was sent by Mrs. *Owen* in *Easter* week 1807 for rent, due from the Petitioner to her husband; that *Jane Park* called in the evening; saw the Petitioner; told him her errand; and he desired her to call the next morning between eight and nine for the money. She went the next morning; and saw a boy; and asked, if the Petitioner was within: she at that time saw the Petitioner through a glass window, sitting in a room behind the shop: the boy went; and told the Petitioner, that Mrs. *Owen's* servant wanted him; and the Petitioner said, "Hush: Hush: say, I am not in;" which the boy accordingly did; when *Jane Park* replied, "He is in; and if Mr. *Bamford* wishes to deny himself, he should not let himself be both seen and heard."

The Petition submitted, that a denial to *Jane Park* was not an act of bankruptcy: she not being a creditor; and that, as he was both seen and heard by her, the denial would not have the effect of delaying a creditor, if she is so to be considered, any more than his appearing openly to her; and it therefore could not

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 BAMFORD,
Ex parte.

amount to an act of bankruptcy; and that *Jane Park* is a menial servant of *Mrs. Owen*, illiterate, and totally incompetent to settle the necessary accounts on a payment of rent, or to give a receipt for the money paid.

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The Petition therefore prayed a new trial.

The original Petition, by the bankrupt and several of his creditors, and the affidavits in support of it, stated, that upon the 5th of *March*, the day, on which the Commission was opened, *Plowman* called at the Petitioner's house; and informed *Mary Drabble*, his servant, that he (*Plowman*) was sent from the office of the solicitors to desire her to go there immediately; as she had a legacy left to her: the particulars of which she would be informed of at the office; where also there was a letter for her upon the subject. She accordingly went to the office at two o'clock; and returned about six; and the result of her affidavit was, that she was compelled by force and threats to make her mark, which she did with much reluctance; being of great age, in a state of infirmity, and deaf. This was contradicted by the affidavit of two of the Commissioners; representing, that they informed her, that, if she did not speak the truth, and swear to her examination, they had the power of committing her. With respect to the Petitioner's absence from home about *January* it was stated, that he was absent upon business; collecting evidence for a suit concerning a family estate, and not for the purpose of delaying his creditors. It was also stated, that the deponent and another person, being bail for the Petitioner, in the beginning of *February* went to his house; but were not admitted: an elderly woman informing them from a window, that he was absent on a journey; that upon the 2d of *March* they called; and saw him; being admitted by the old woman through an entry; that they threatened to surrender him; upon which he set off with the deponent

nent from *Wilmslow* for the purpose of procuring money. The affidavit of the bankrupt in reply contradicted that of *Plowman* and *Hartley*, as to their having seen him through the fan-light by standing upon the opposite steps * and in other particulars: the bankrupt stating, that the fan-light was then stopped up; and that he was not at home at that time. It was also stated, that he had retired from business, sold his stock, and divided the produce among his creditors upon the 9th or 10th of *April*, 1807; and had not since followed any business.

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The affidavit of *Mrs. Owen* stated, that she managed her husband's affairs; who was paralytic; that she had frequently sent, and in general procured payment of the rent from the petitioner, by *Jane Park*; but was often disappointed; as she was generally informed, that he was not at home, and was desired to call again. *Jane Park* confirmed this; and stated, that the petitioner knew her as the servant of *Mrs. Owen*.

Mary Drabble was not called as a witness upon the trial; and the act of bankruptcy, attempted to be set up by her deposition was abandoned.

Sir Samuel Romilly and *Mr. Wingfield*, in support of the Petition.

The first objection to this Commission is, that the person, who is the object of it had ceased to trade; and therefore was not an object of the Bankrupt Laws. The expression of the Acts of Parliament (68) is, that persons "using" the trade of merchandize, &c. who shall do certain acts, shall be bankrupt; and though the general understanding, perhaps the course of decision has been against this objection, yet when the attention of the Court is called to it, such a construction of these highly penal laws cannot be adopted. This objection is not however

(68) Statute 13 *Eliz. c. 7.* Statute 1 *Jam. 1. c. 15.* Statute 21 *Jam. I. c. 19.*

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 BAMFORD,
Ex parte.

however destitute of authority. In the case of *Hunt v. Roberts* (69) the act of bankruptcy, set up, was the execution of a deed; involving certainly a very important question of fact; whether an undue preference was intended; depending upon the circumstances, whether it was spontaneous, or under a threat of process; &c. but, the deed having been executed, after the grantor had quitted trade, the opinion of Mr. Justice *Grose* was so clear, that upon that ground it could not be an act of bankruptcy, that, though much pressed, he refused to save the point; and nonsuited the Plaintiff. There was an application to your Lordship for a new trial; which was disposed of upon some particular circumstances without a decision upon that point.

The next objection is, that here is no act of departing from the dwelling-house within the Statute. Upon the circumstances stated, the persons who called at the petitioner's house, must be considered as total strangers; and then the correct representation of the facts is, that at an early hour in the morning, in winter, before daylight, this man, hearing a violent knocking at his door, is alarmed; and goes off by the back-door. It cannot be concluded, that he knew them to be bailiffs; and, though they were so, it is not stated that they had any legal process to execute. How then from this act can the intention to delay creditors be collected? Admitting, that a departure with the intention to delay a creditor would be sufficient, the case of *Barnard v. Vaughan* (70) being now over-ruled, can that inference be drawn merely from the circumstance, that these persons, usually following the occupation of bailiff's followers, called at that

(69) At the *Warwick Assizes*: before *Grose*, Justice. 487. *Wydown's Case*, ante, Vol. XIV, 80, and the note.

(70) 8 *Term Rep.* 140. See V, 577.
Robertson v. Liddell, 9 *East*,

that unreasonable hour; having given no previous information of their purpose? In the case of *Blatch v. Archer* (71) an arrest by the son of the bailiff was held legal: the bailiff himself not being in sight: but it was clear, that he was there *on that business*; which is Lord *Mansfield's* expression. It does not appear in this case, that the bailiff was there at the time; and a writ cannot be transferred in this manner from one person to another.

1808-9.
BAMFORD,
Ex parte.

Thirdly, as to the denial to the servant of a creditor, it is true, the opinion of Lord *Camden* (72), that the denial must be to the creditor personally; has been overruled to the extent of admitting a denial to persons of a certain description, applying on behalf of a creditor; as a banker's clerk; for convenience, and in favor of commerce: but a denial to a female servant, who could not write or read, and was wholly incapable of giving a discharge for the debt, sent, not by the creditor himself, but by his wife, is not sufficient. This denial is also liable to farther objection. The expression of the Act of Parliament "keep house" must be understood keeping himself concealed in the house: but this person was visible: *Jane Park* saw him; and her observation was, that, if he meant to be denied, he should not shew himself. A debtor, who sees, and talks to, his creditors, cannot be considered as keeping house.

Serjeant *Cockell*, Mr. *Richards*, and Mr. *William Agar*, for the Assignees.

Upon the facts that appear, it is impossible to doubt the purpose, with which the petitioner quitted his house.
Several

(71) *Corp.* 63. *Bramley v. Munde*, 1 *Cooke's*
(72) *Barrow v. Foster*, *Bank Law*, 83, 84, 5th edit.;
1 *Cooke's Bank. Law*, 82. 8th edit. by Mr. *Roots*, 94.
See Colkett v. Freeman,

1808-9.
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 BAMFORD,  
*Ex parte.*

Several writs were out against him: he had been continually arrested, and was using every subterfuge to evade the pursuit of his creditors, for a considerable time. It appears upon the Judge's notes, that, not only the officer, but these two persons, had been employed to arrest him. It is not absolutely necessary for this purpose, that they should have had authority to arrest. How is his departure from his house in this manner to be accounted for except by apprehension of his creditors, and the object of escaping from them?

A denial to any person, coming to demand money on behalf of a creditor, is sufficient evidence of the act of bankruptcy by keeping house; and the circumstance, that the petitioner was seen at the time is perfectly immaterial. The servant had no opportunity of conversing with him. There was a door between them. Acts of bankruptcy are continually proved in this way: part of the evidence of the denial consisted frequently of the discovery of the party, watching from an upper window. This person must be considered as sent by a creditor. Mrs. Owen is the creditor for this purpose; acting as agent to her husband; who was paralytic; managing his affairs; receiving his rents; and having before received them from this bankrupt: her act therefore was the act of her husband; and the servant called in the morning by the appointment of the petitioner.

The objection, that the petitioner had retired from business, if it should prevail, would supply a new and easy mode of evading the Bankrupt Laws. Can a trader, meaning to commit an act of bankruptcy, prevent all the consequences, attaching upon his property, by shutting up his warehouse? Such a notion is contrary to all experience, and the whole spirit of the Bankrupt Law; according to which, if a man has contracted debts in the course of trade,

trade, he cannot by ceasing to trade withdraw from the consequences.

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*Ex parte.*

*Sir Samuel Romilly*, in Reply.

The departure from the house must in some way be connected with the creditor, in order to raise the inference essential to this act of bankruptcy. The fact as to that is no more than that, hearing a knocking at the door at an untimely hour in the morning, he left the house; the persons knocking not appearing to have any business there; as, though they might have been in the habit of acting as bailiff's followers, it does not appear, that they were there in that character. How then is the departure connected with any intention to delay a creditor? It does not appear, that he even saw these two men. He had no means of collecting their purpose. The consequences of this decision therefore are very important; if it establishes an act of bankruptcy by quitting the house upon hearing a knocking at the door by persons, who had no authority as officers; and must be considered as having no other object than merely to disturb the family; as no distinction can be raised from the circumstance, that these persons had acted as bailiff's followers.

As to the denial, keeping house must mean concealment. What is the difference, whether he was seen through the window of a partition, and heard giving directions to deny him, or had appeared, and told the creditor, he would not be at home to him? The observation of *Jane Park* was addressed, though apparently to the boy, really to the petitioner.

*The Lord Chancellor.*

In this case upon the contradiction of evidence as to the fact of the act of bankruptcy proved, by departing from



1808-9.  
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 BAMFORD,
Ex parte.

from the dwelling-house, and under the circumstances, disclosed by the affidavits, that *Barrowclough* had some time before searched the house for the petitioner in vain, that these two persons *Plowman* and *Hartley* had gone there twice only the day before, attending also to the mode, in which *Mary Drabble* was procured to make her deposition, it appeared to me to be due to justice, that the question, whether an act of bankruptcy had been committed, should be tried; that an opportunity should be given to the bankrupt of disproving the act of bankruptcy; and to the assignees of sustaining the Commission by proving any other act of bankruptcy. The question now is, whether the fact, that this petitioner has committed an act or acts of bankruptcy, has been proved, so that I should hold the verdict, that has been found, conclusive upon this application to supersede the Commission.

. Upon the point, which has been taken at the trial, whether a Commission can be sustained by an act of bankruptcy, committed after retiring from trade, the debts, contracted in the course of that trade, remaining unpaid, I shall say no more, than that my clear opinion, unqualified by any doubt, is, that the Commission may be sustained; and I should not have heard so much upon it, if I had not understood, that two of the Judges held different opinions upon that question at the Assizes (73).

The next question is, whether one or more acts of bankruptcy have been committed; and, with reference to the act of bankruptcy by departure from the dwelling-house, the opinion of the Judge upon the objection, which was pressed, that the bailiffs had no writ, was, that the objection, though it would have prevailed in an action of trespass, would not do in an issue: an opinion, that could only be formed upon the ground, that the intention

was

was such as would make the facts proved, coupled with the intention, supposed to arise from them, an act of bankruptcy. Upon an application for a new trial I am at liberty to look, not only to the evidence of what happened that morning, but at the whole of the evidence and the proceedings; and I find, that a writ had been out against the petitioner some time: *Barrowclough* had searched the house before; had been there twice the preceding day with a writ; had seen *Mary Drabble*; who was not called at the trial by either party; but in her evidence upon the proceedings states, that persons had been there the day before; and were told by the children, that the petitioner was from home. Then, with these circumstances, from the 24th of *January* to the day preceding his departure, and upon the facts, that occurred on that morning, the questions to be left to the Jury were, whether he knew, that a writ was out against him; whether he supposed, that the persons, who came to his house, had that writ; and whether under that impression, alarmed by the knocking at the door, he quitted the house. Upon the view I take of this evidence, if the Jury had found those points, submitted to them, in the negative, I should have formed very clearly a different conclusion as to the intention. The circumstance, that *Plowman* and *Hartley* had no writ with them, is, with reference to this point, immaterial. If, knowing, that the officer has the writ, the debtor departs, even under a chimerical belief, that he has it with him, but with the intention of delay, the act of bankruptcy is complete (74).

1808-9.
BAMFORD,
Ex parte.

The circumstances, regarding the other act of bankruptcy, are, that the bankrupt was tenant to Mr. *Owen*; that Mrs. *Owen* had given testimony, clearly proving, that she was constituted the agent of her husband, to receive the rent: the bankrupt had acted under that agency: had paid her rent from time to time. She states the

circum-

(74) That actual denial or delay is not, as it formerly was held to be, essential, see the note, ante, Vol. V, 577.

1808.

BAMFORD,

Ex parte.

circumstance of a denial to her; when he was at home; upon which the Judge intimated, that it did not appear to be by the petitioner's order; though I think, there was enough to leave to the Jury. That however is not the particular act of bankruptcy, upon which this verdict proceeded. As to the denial to *Jane Park*, she was sent upon the preceding evening to demand payment of the rent: he saw her; and said, if she would call the next day, he would pay it. She called by his appointment. Here therefore is not the doubt, that occurred in the original case of a denial to a clerk; who might not have gone, nor the other have known that he came, with the intention of demanding payment. Neither does this resemble the case, that was before me, upon an attempt to make the denial of a man in prison an act of bankruptcy: but an act of bankruptcy may be committed by denial to a person, who knows, that the debtor is in the house: the proof of beginning to keep house depending, not upon the possibility of access to him, but upon the intention of the denial. Here was a communication between the rooms: but such a communication, that he was seen merely by accident. This person, calling by the appointment of the petitioner, conducts herself as was natural: seeing him, and hearing him give directions to say, he was not at home, she says to the boy angrily, that if his master wished to deny himself, he should not be both seen and heard. Is not this a beginning to keep house? It has no resemblance to the case of a man, coming out, and saying, he is not at home. There is no keeping house.

Under all the circumstances of this case, and considering, that the object is to supersede a Commission, there is not ground enough for granting a new trial.

The Petition was dismissed.

PAXTON, *Ex parte*.

ON the 20th of *June*, 1808, a docket was struck at the bankrupt office by *Edward Bilke* against *William White*; and on the 25th a Commission of Bankruptcy issued against him. On the 28th of *June*, *Bilke* received from *White* two bills of exchange for 100*l.* and 200*l.*, and a bond of the bankrupt and another person for 443*l.* 6*s.* 10*d.* and delivered up a bond of the bankrupt, upon which his debt from the bankrupt was founded; and it was agreed, that no farther proceedings should be taken under the Commission.

On the 12th of *July* an Order was made upon the Petition of another creditor for superseding that Commission for want of, proceeding upon it; and upon the Petition of that creditor another Commission, of that date, issued against *White*. Under that Commission *Bilke* was admitted to prove a debt of 719*l.* 2*s.* 3*d.* and was chosen one of the assignees. Acts of bankruptcy by denial to a creditor, and quitting the dwelling-house with intent to delay creditors, were proved.

This Petition, presented by creditors who had proved under the Commission, stated, that by the bond and bills, given by the bankrupt to *Bilke*, he will privately have, and receive, the whole amount of the debt, due to him from the bankrupt; and the other creditors will receive less in the pound than he will; as the estate will not pay ten shillings in the pound; and prayed, that the proof, made by *Bilke*, may be expunged; that he may be ordered to deliver up the bond and bills for the benefit of the estate; that the assignment may be cancelled; and a new assignment may be executed.

1808-9.

1809.

Jan. 10th.

Commission of Bankruptcy, relinquished by the petitioning creditor upon obtaining security, superseded: his proof under another Commission expunged; and, being an assignee, a new choice directed.

The knowledge of one or two individual creditors, if no general communication, did not prevent the effect of the statute 5 *Geo.* II. c. 30. s. 24.

1808-D.

PAXTON,
Ex parte.

Bilke by his affidavit stated, that the partners of *White* informed him, that *White* was embezzling his property; and threatened to leave the kingdom; that they prevailed upon the deponent to sue out a writ; upon which he could not be found; that afterwards, being assured by them that *White* had committed an act of bankruptcy, the deponent struck a docket accordingly; that *White* afterwards entreated him not to take such a step; assuring the deponent of his solvency; that he was endeavouring to obtain a settlement with his partners; that he had not committed an act of bankruptcy; &c. and offering security; that he was accompanied by the person, whom he proposed as his security; that the deponent never intended to conceal the transaction; that he thereupon accepted the security: and promised not to proceed under the Commission.

Mr. *Hart* and Mr. *Cooke*, in support of the Petition: Sir *Samuel Romilly* and Mr. *Montague*, against it.

The Lord CHANCELLOR.

This Petition to expunge the proof of a debt furnishes one extremely material point: the other perhaps may be considered rather a question of expediency than otherwise of much importance. Experience in the business of bankruptcy proves, that the affidavit, made upon striking a docket, is rather too rashly sworn in many cases: but I have not in this case the doubt, that I have expressed in others (75); whether the act of striking a docket alone would bring the party within this clause of the Act of Parliament (76); upon the principle, that a Court

Whether the striking a Docket merely could be considered the issuing a Commission within the stat. 5 Geo. II. c. 30. s. 24. (a penal clause) *quære.*

(75) *Ex parte Wydown*, ante, Vol. XIV, 80; see page 85. *Ex parte Browne*, post, 472, and the notes.

(76) Stat. 5 Geo. II. c. 30. s. 24. The bankrupt could not take advantage of this clause of the statute: *Ex parte, Kirk*, post, 464.

Court ought not in the construction of a penal Statute to consider as prohibited by the Legislature an act, that is not in terms prohibited, or constituted of circumstances, furnishing, demonstration altogether plain as to the intention to involve individuals, so acting, in the extent of such a clause. This is the case of securities obtained by the creditor after, not merely a docket struck, but a Commission actually issued. The question is, whether by the true meaning of the Statute, which, being a penal act, I am not disposed to strain, the debt is gone. This clause, reciting the practice, amounting to a general mischief, of creditors, who have taken out Commissions, extorting their whole debts from the bankrupts, or getting real or personal security, makes that an act of bankruptcy; though it may be uncertain at the time, whether that creditor will receive more than the others. The prohibition is calculated to meet the mischief, where men act injudiciously, as well as where they act dishonestly towards third persons. I agree, the man must be a bankrupt within the meaning of this clause: but the language "after *issuing* of any Commission against "him" shews, an adjudged bankrupt was not intended; but that he might be a bankrupt within the meaning of this clause before any Commission established against him. In the passage, describing the effect of the security, "whereby such person or persons suing out "such Commission shall privately have and receive more "in the pound" than the other creditors, the word "*shall*" has been construed "*may*;" and must be so construed.

1806-9.
 PAXTON,
Ex parte.

The Statute, not merely prohibiting the transaction, but making it an act of bankruptcy, proceeds upon this reason; that, if the creditor, who has taken out a Commission, stops, before the bankruptcy is declared, through the proof, that an act of bankruptcy was committed, may be in his power, it may not be within the reach of any other creditor:

1808-D.

PAXTON,

Ex parte.

creditor: therefore that act is made itself an act of bankruptcy; upon which without farther proof another Commission may be taken out. It is not however necessary to decide upon the argument, whether this clause of the Statute means a person, actually a bankrupt, or so treated by those, who take out the Commission; as upon the evidence the bankruptcy is established clearly, and without contradiction. The construction attempted upon the word "*privately*" from the circumstance, that one or two individual creditors knew of it, would defeat the act altogether. In *Fryer v. Hebblethwaite* there was a general communication; upon which the security could not be considered privately taken within the meaning of the act: but this is clearly within it.

The consequence is, this proof must be expunged; and under the circumstances it would be too much to hold, that the creditors should not review the choice of assignees (77).

(77) *Ex parte Thompson*, notes, 158, and XIV, 85. ante, Vol. I, 157; see the *Ex parte Kirk*, the next case.

1809.

Jan. 18th.

KIRK, *Ex parte.*

A Bankrupt could not supersede his Commission by impeaching the petitioning creditor's debt on the ground of a security

taken privately: the remedy under the statute 5 Geo. II. c. 30. s. 24. being given to some other creditor.

Commission of Bankruptcy after a considerable acquiescence by the Bankrupt not superseded without a trial at law.

THIS Petition, presented by a bankrupt, praying, that the Commission against him may be superseded, stated, that the Commission issued on the 30th of September, 1806; and that the Petitioner surrendered, and submitted to be examined under the Commission; but always protested against the legality of it.

The

The Petition farther stated, that the Petitioner and *Henry Lees*, then his partner, in *August*, 1805, drew a bill of exchange upon *James Lilley* for 250*l.*, then due to them; which was accepted; and paid to *John Fothergill*. That bill being returned dishonored, *Lilley* drew three bills for 84*l.* each, covering the former bill and the expences, at two, three, and four, months after date, in favor of *Willets*, indorsed by him to the Petitioner, and by him to *Fothergill* in lieu of the first bill. One of the bills, last mentioned, was indorsed by *Fothergill* to *Spencer*, and the two others to *Dearman*. *Spencer*, the bill being dishonored, arrested *Willets*; when *Fothergill* proposed to *Willets*, that, if he would give his draft for 170*l.* to *Fothergill*, he would stop *Spencer's* farther proceedings; and pay the draft in *Spencer's* hands, and the second of those three drafts for 84*l.* each, when due. *Willets* gave his draft accordingly: but *Fothergill* did not give up any of the former bills; though often applied to: but at the time, when the Commission issued, they remained, and still remain, in the hands of *Spencer* and *Dearman*; who claim the amount from the Petitioner, *Willets* and *Lilley*. The second bill for 84*l.* being dishonored, *Lilley* at the instance of *Fothergill* drew another bill for 170*l.* in favor of *Willets*.

The Petition farther stated, that in *October*, 1805, the Petitioner purchased in the way of his trade from *Fothergill* a quantity of madder roots, which he represented to be *Turkey* madder of the first quality; to be paid for by the Petitioner's acceptance at four months after date; which *Fothergill* pressed for immediately; and the Petitioner not having then examined all the goods, declined at first to give: but upon *Fothergill's* assurance, that if in any way they did not answer the representation, he would make a reasonable allowance, and it would materially serve him, the Petitioner gave his acceptance for

1809.

KIRK,

Ex parte.

265*l.* 0*s.* 1*d.* The madder roots proved to be *Dutch*, and of very inferior quality; and the Petitioner, having in vain proposed an arbitration, was compelled to sell them by auction for 73*l.*; having given *Fothergill* notice. In *August*, 1806, *Fothergill* arrested the Petitioner for the amount of his acceptance on that account; and in *September* took out the Commission; and procured himself to be immediately appointed provisional assignee; and took possession of all his (Petitioner's) effects.

The Petition farther stated, that in *October*, before the Commission had been advertised in the *Gazette*, a treaty took place; and the Petitioner agreed to pay *Fothergill* the full amount of his debt with interest; which *Fothergill* agreed to accept; and the Petitioner accordingly gave him two notes, for 260*l.*, in cash 5*l.*, and cotton twist of the value of 230*l.*, on account of his debt: but the Petitioner always strongly protested against the legality of such debt; submitting to it, in order to prevent the disgrace of a Commission. *Fothergill* accordingly directed, that the Commission should not be advertised.

The Petition farther stated, that the Petitioner had not committed any act of bankruptcy; that *Fothergill* had received two bills, including the bills for 170*l.*, to the amount of 1107*l.* 0*s.* 1*d.* and his original debt did not exceed 375*l.*; and when the Commission issued, there were bills, given to him on account of his demand outstanding, far exceeding his debt; which bills he had paid away for full consideration: viz. two of 170*l.* each to *Patten*; and one of 84*l.* to *Spencer*; which bills remained in their hands at the time of the bankruptcy; *Patten* having given notice to the petitioner not to pay; and the petitioner did not at the date of the bankruptcy owe *Fothergill* any debt; he having received from the * bills paid away a much larger sum than was due; and the petitioner is still liable to the holders.

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Mr.

Mr. Hart and Mr. William Agar, in support of the Petition, contended, upon the circumstances, that there was no debt, due to the petitioning creditor; but supposing a debt to have been contracted, it was gone, by the effect of the transaction between him and the bankrupt, under the Act of Parliament(78); and, the petitioning creditor's debt being gone, the Commission could not stand.

1806.
KIRK,
Ex parte.

Sir Samuel Romilly and Mr. Heald, for the Assignees, urged the hardship upon them; chosen, after the Commission was in a course of execution; acting *bond fide* for the creditors; but having no connection with the petitioning creditor; distinguishing this from the late case *Ex parte Paxton* (79); the Statute not intending to give this advantage to the bankrupt: on the contrary declaring the transaction between him and the creditor to be an act of bankruptcy; upon which any other creditor may take out a Commission. They also cited *Garrat v. Biddulph* (80), and as to the acquiescence, *Ex parte Nutt* (81).

The Lord CHANCELLOR.

This is an application by a bankrupt to supersede the Commission; which issued against him in the year 1806: under which Commission he surrendered; protesting however against its validity upon different grounds; that he had not committed any act of bankruptcy; and that he did not owe 40*l.* to the petitioning creditor. The bankrupt, submitting to the Commission, had an opportunity of putting in issue those circumstances. He might either * have brought an action; or have presented a petition immediately. Instead of adopting either of those modes, he

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(78) Stat. 5 Geo. II. c. 30. s. 24. (80) 2 Mont. Bank. Law, App. 150.

(79) Ante, 461; see the references. (81) 1 Atk. 102.

1809.

 KIRK,
Ex parte.

Distinction between the application of a creditor and that of the bankrupt to supersede the Commission upon a prior act of bankruptcy, &c. Whether that is competent to the bankrupt, *quære.*

he permits the Commission to take that course, which it must inevitably take; involving, not the assignees only, but third persons, in the consequences; unless he interposes by some measure more effectual than a mere verbal protest. The objection, that the bankrupt had not the means of disputing his Commission, and is therefore to be considered as having stood by under that necessity, rather than as submitting to it, has been urged without success in stronger cases; even upon a capital prosecution at the *Old Bailey*. In many instances the Court has been obliged upon the application of third persons, creditors, to supersede the Commission on the ground of a prior secret act of bankruptcy (82); subjecting to all the hardship, that must ensue, the assignees and purchasers; where, as it was clear, that a prior act of bankruptcy had been committed, there was no probable question to be tried. There is however, as we now know, a great difference in a Court of Law between the application of a creditor, and of the bankrupt for that purpose (83). This is an application by the bankrupt to supersede the Commission, at the expiration of nearly two years; under circumstances, with reference to these assignees, hard beyond example; as the petitioning creditor, who is generally the person to furnish the evidence of the debt,

(82) A remedy was applied to this by the Acts of Parliament 46 *Geo.* III. c. 135, and 49 *Geo.* III. c. 121; which provide, that no Commission of Bankruptcy shall be avoided by an act of bankruptcy, committed prior to the contracting of the petitioning creditor's debt, if he had not notice of such act of bankruptcy, when the debt to him was contracted: the issuing of a former Commission, though afterwards superseded, to be deemed notice; if it shall appear, that an act of bankruptcy had been actually committed. This is adopted by statute 6 *Geo.* IV. c. 16. s. 19, omitting the provision as to notice.

(83) See *Bullock's Case*, 1 *Taunt.* 71. Ante, Vol. XIV, 452.

debt, has twice pledged himself by his oath to a debt for money lent and advanced, and goods, sold and delivered; so as to mislead every one, except perhaps the bankrupt himself. Am I to supersede the Commission, at the hazard of all the mischief, that may ensue, without giving an opportunity of trying its validity; under circumstances by no means clearly shewing, that this petitioning creditor's debt may not be sustained; there being at least a probable cause of action for the goods sold; and that much fortified by the time, that has been suffered to elapse?

1809.
KIRK,
Ex parte.

With regard to the objection upon the Statute (84), whether the point has been decided, or not, my opinion is very clear upon it. *Fothergill*, the petitioning creditor, took security for his debt; and directed his agent not to proceed in the Commission. The question upon that is, whether it is competent to the bankrupt to complain of it. It is true, in general cases, where a debt is cut down by the policy of the Law, the complaint may be made by *particeps criminis*: but the mischief and prejudice to third persons is the consideration of the relief (85). The intention of this Act of Parliament is, not that the bankrupt himself should petition; who cannot issue another Commission; but that any other creditor may supersede the Commission; and take out another; making that very transaction the act of bankruptcy; as he may have no other; and under that new Commission there is authority to call back the payment, estate, debt, or security; whatever it may be.

In general cases, where a debt is cut down by the policy of the law, the complaint may be by *Particeps Criminis*.

Therefore dismiss this petition; and let them bring an action; in which also the question, whether the debt is gone at Law, may be tried,

(84) Stat. 5 Geo. II, c. 30. *Mather*, Vol. III, 373, and s. 24. the note, 374.

(85) See ante, *Ex parte*

1809.

Feb. 6th.

Assignee in Bankruptcy removed, and charged with interest at 5*l.* *per cent.* (before statute 49 Geo. III. c. 121. s. 4.) for money paid in at his banker's to his account, and used as his own property.

TOWNSHEND, *Ex parte.*

THE object of this petition was to remove assignees under a Commission of Bankruptcy and to charge interest for money, part of the bankrupt's estate, received by one of the assignees, paid in at his banker's, to his own account, and used as his own property.

Sir *Samuel Romilly* and Mr. *Horne*, in support of the petition: Mr. *Richards*, for the Assignees.

The Lord CHANCELLOR.

I made the Order for charging the assignees under this Commission of Bankruptcy with interest at 5 *per cent.*; feeling it to be indispensably necessary to act upon the rule, that an assignee in bankruptcy, who chooses to pay a balance, in his hands in that character, to his own private account at his banker's, must be considered as making use of the money; and that circumstance alone calls for interest at the rate of 5*l.* *per cent.*; and clearly, it ought to be so for several reasons. First, if the assignee should fail, that money, placed at his banker's to his own account would be his estate, not that of the bankrupt. If the assignee should die, not leaving assets to pay all his debts, that money would be part of his assets; in which the estate of the bankrupt would only share with his other creditors. The money therefore, placed in that situation, is not safe for those, to whom it belongs. Farther, it is well known, that generally, tradesmen must have money in the hands of their bankers; and if the business of this tradesman required a sum of 1000*l.* to be at his banker's, that amount of the bankrupt's estate, placed there, saved him the employment of 1000*l.* of his own in that way. There is however a considerable

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siderable difference between an assignee, paying in to his own account at his banker's a sum of money; part of the bankrupt's estate, not taking care to ear-mark it by paying it to a particular account, which many honest men might do, and knowingly making use of it. Therefore, as the affidavit of this assignee was not inconsistent with the possible fact, that this money might have been turned by him over and over again for his own use, I gave him an opportunity of explaining it; which he has not done.

1809.
TOWNSHEND,
Ex parte.

Under these circumstances therefore, the former assignees having been actually discharged for this very reason, using money, part of the bankrupt's estate, as their own, and new assignees chosen in execution of the principle respecting such use of the property, no substantial reason appearing for not having made this money the subject of dividend, being taken by this person, one of the new assignees, placed by him at his banker's, used as his own money, his clerk furnished with authority to draw it out, as he pleased, and actually doing so, I must by enforcing this rule, if possible, convince persons, standing in the situation of trustees, as assignees in bankruptcy, that they are not to make use of the bankrupt's estate for their own private purposes. For that reason alone I shall direct a meeting to be called for the purpose of choosing an assignee instead of that one, who has made this use of the property. The other assignee has not used the money himself; and is only to be charged with negligence in permitting his co-assignee to do so. * Therefore, to mark the distinction, I do not think it right to remove him (86).

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(86) See ante, *Hilliard's* case of executors. By the *Case*, Vol. I, 29, and the Act of Parliament, 6 *Geo.* notes, 90, 99. *Ashburnham* IV, c. 16, s. 104, the *Com-* missioners are required to charge

1809. charge any assignee with in- employed for his own bene-
 TOWNSHEND, interest at the rate of 20*l.* *per* fit, or permitted to be so
Ex parte. cent. for any sum to the retained or employed by
 amount of 100*l.*, part of the any Co-assignee.
 bankrupt's estate, retained or

1809.

BROWNE, *Ex parte.*

Feb. 10th.

Proof in Bank- THE petition stated, that in *May*, 1807, *William*
 ruptcy under a *Hanslip*, a tanner, at *Stradbroke*, being informed,
 security for that one of the petitioners was about to strike a docket
 more than the against him, and being much embarrassed, went to con-
 debt expunged: but sec- sult *Henry Jeffries*; who, being a creditor to the amount
 rity or satis- of only 200*l.*, requested *Hanslip* to give him a bond
 faction, taken for 300*l.*; admitting that was more than the debt; but
 after a Docket suggesting, that it would enable him to cover his de-
 struck, not fol- mand in the event of a Commission; which bond was
 lowed by a executed accordingly, in the penal sum of 600*l.*, to se-
 Commission, cure 300*l.*, dated the 9th of *May*, 1807. On the 4th
 though it can- of *August* a Commission issued against *Hanslip* on the
 not be retain- petition of *Jeffries*. That Commission was never pro-
 ed, and may ceeded in: but *Jeffries* caused a deed of trust to be
 amount to a prepared, dated the 14th of *August*; assigning all the
 Contempt, was property of the bankrupt to *Jeffries* in trust for the
 not within the benefit of all the creditors, and as to the surplus for
 stat. 5 Geo. II. the bankrupt.
 c. 30. s. 24. The original
 The original debt therefore
 not forfeited.

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*The petition farther stated, that the trustees under
 that deed possessed, and disposed of, the whole property.
 The Commission was superseded on the 19th of *Septem-*
ber; and on the 3d of *October* another Commission is-
 sued on the petition of *Philip Hurd*; under which *Jef-*
fries was chosen one of the assignees with this petitioner.

Under

Under that Commission a debt of 621*l.* was proved by *Brooks*, as assignee of the bond to *Jeffries*.

1809.
BROWNE,
Ex parte.

The petition, stating misapplication of the property in various instances, prayed, that the proof of *Brooks* and others may be expunged; that *Jeffries* may be removed from the office of assignee; and that new assignees may be appointed, &c. The petition stood for judgment.

The Lord CHANCELLOR.

It does not appear in this case, whether a docket was actually struck, when the security was obtained by *Jeffries*: a fact, material with reference to two cases, *Ex parte Thompson* (87), determined by Lord *Thurlow*; and *Ex parte Gedge* (88), by Lord *Rosslyn*; whose opinion was that, if after a docket struck the creditor takes security or satisfaction, though no Commission issues, the effect of that transaction is, not only a forfeiture of what was so received, and an act of bankruptcy, but that all the penal consequences under the Act of Parliament (89) attach. That decision is founded upon the case *Ex parte Thompson*; which is no authority for that doctrine. Lord *Thurlow* compelled a person, who had so dealt, after a docket struck for the purpose of taking out a Commission against one party, the acceptor of the Bill, and a Commission actually issued against the drawer, * to refund what had been received: but that judgment does not involve the consideration, much less a decision, of the point, whether the creditor was restored to the situation, in which he was before, with regard to his old debt; appearing to decide only, that he should not keep what

[*474]

(87) Ante, Vol. I, 157. vision extended to the case of
(88) Ante, Vol. III, 349. a docket by stat. 6 Geo. IV.
(89) Stat. 5 Geo. II. c. 30. c. 16. s. 8.
s. 24, repealed: but the pro-

1809.
 BROWNE,
Ex parte.

what he had obtained under those circumstances. The expression of the Statute is, "after issuing of any Commission" (90); and I agree with Lord *Rosslyn*, that all the mischief, which the Legislature intended to prevent is established, if the creditor is at liberty to take the satisfaction or security after striking a docket: but my opinion is, that I have no right to consider a docket struck as the issuing of a Commission; and that the Legislature has not prohibited this Act, and attached to it these penal consequences, unless it is done after the issuing of a Commission. Lord *Rosslyn* observes, with truth, that the person, striking a docket, thus secures the means of trafficking most improperly with the bankrupt for the period of four days; during which no other creditor can take out a Commission. The Legislature however understood, that the person striking a docket, was to proceed to take out the Commission forthwith: the construction of the Act of Parliament was, that no other creditor could take out a Commission: and then in this jurisdiction was interposed the rule, that the docket should not avail, unless followed by a Commission in a given time.

To the question, whether the creditor can hold the benefit of the security he has obtained, the answer is, that upon the principles of a Court of Equity he cannot; and farther; the *Lord Chancellor* in the exercise of this jurisdiction having interposed that period, during which the

(90) See the notes, ante, Vol. I, 158. XIV, 85, *Wydown's Case*. Ante, *Ex parte Paxton*, *Ex parte Kirk*, 461, 4. As to the effect of an agreement for a composition after a docket struck, preventing that creditor from taking out a Commission, if the time has elapsed, under an Order by Lord *Thurlow* (in Mr. *Elley's Collection*), see *Ex parte Masterman*, post, Vol. XVIII, 298.

the creditor should have the opportunity of receding from his purpose, the act of taking security, and thus evading the object of the Legislature, by abuse of the process, intended for the benefit of the creditors, generally, might perhaps be represented as a gross contempt: yet the conclusion does not follow, that, as the security is under such circumstances to be cut down upon equitable principles, and the transaction amounts to a contempt, therefore the Act of Parliament attaches. Upon this alone therefore I have no difficulty in declaring, that *Brooks*, the assignee of this bond to secure the sum of 300*l.* cannot insist upon proving more than the sum of 200*l.*: which was due to *Jeffries*, when he took the bond: but, when it was agreed by all the creditors, that the Commission, which had issued, should not be prosecuted, and an assignment in trust for the creditors was substituted, about the time *Brooks* is represented to have advanced to *Jeffries* the whole sum of 300*l.*; taking an assignment of the bond; and *Brooks* under the second Commission proved in respect of that sum of 300*l.* as money advanced for the use of the bankrupt. That bond is to be considered a nullity: and the proof under it for the sum of 621*l.* must be wholly expunged; but with liberty to *Brooks* to offer such other proof under this Commission, as he can propose.

1809.

BROWNE,
Ex parte.

The Order declared the bond a void security (91); and directed the proof to be expunged; with liberty to *Brooks* to propose proof to the extent of the original debt to *Jeffries*; and ordered *Jeffries* to be discharged from being assignee; and to pay the costs of superseding the former Commission.

(91) See *Ex parte Paxton*, ante, 461.

1809.

Feb. 10th.

Affidavit in Bankruptcy ordered to be taken off the File, as irrelevant and scandalous; with costs as between attorney and client.

SIMPSON, *Ex parte*.

THE Petition, which stood for judgment, stated, that a Petition had been presented in *June* last; praying, that a Commission of Bankruptcy may be superseded; as being a fraudulent and concerted Commission, against a person, who was not a trader; and that the certificate may be staid,

The Petition farther stated, that in support of that Petition an affidavit was filed by the solicitor, concerned in it, containing matter and charges of a criminal nature, reflecting upon these petitioners, and very prejudicial to their character and reputation, not only false and unfounded, but irrelevant and scandalous, as well as impertinent. The Petition prayed, that the said affidavit may be taken off the file: or, that the scandalous and impertinent charges and matters, contained therein, may be expunged; and that the said solicitor may be ordered to pay the costs.

The affidavits in support of the objection to the trading stated, that the bankrupt was only an underwriter; who in that character cannot be a bankrupt (92): those on the other side representing him also as an insurance broker, and a bill broker. The passage chiefly objected to, as scandalous, asserted, that a party, who supported the Commission, was one of a gang of swindlers, who attended at *Lloyd's Coffee-house*, &c.

The Lord CHANCELLOR.

This is the first application of the kind in bankruptcy. With regard to its object there are some general principles,

(92) *Ex parte Bell*, ante, 355.

ciples, which cannot be doubted. If that, which is stated, is material to the issue, it may be false; but cannot be scandalous: if relevant, it is not impertinent: though scandalous in its nature, if relevant and pertinent, it cannot be treated as scandalous; and, if false, it must be dealt with in another way: but, if, irrelevant, and especially if also scandalous, there would be much reason to regret, that a Court should not be armed with the power to protect parties from the expence, and its records from the stain, which too frequently arise from the introduction of irrelevant and scandalous matter upon affidavits in this jurisdiction.

Having read the affidavit, which is the subject of this application, I can find no ground, upon which the greater part of it can be represented as material: nor can I conceive, how a great part can be described as not scandalous; bearing most cruelly upon character. Upon the question, whether I have the power to grant this relief in bankruptcy, I have no doubt whatsoever, and I do not think, with reference to this subject of scandal, in proceedings either in causes, or in bankruptcy (93), that any application by any person is necessary. The Court ought to take care, that either in a suit, or in this proceeding, allegations, bearing cruelly upon the moral character of individuals, and not relevant to the subject, shall not be put upon the record.

I cannot after this explanation, find, what was that interest, or materiality, which made it fit, that a great part of this affidavit, filed in support of the former Petition, should be upon the record. A very considerable proportion of it is perfectly immaterial and irrelevant, though not scandalous; and of that some part is of such a nature, that, not being material or relevant, it must be considered scandalous; and this very unfortunate circumstance

1809.

SIMPSON,
Ex parte.

Allegations, material to the issue, are not impertinent; and, being relevant and pertinent, though they may be false, and, of whatever nature, are not scandalous.

Scandalous matter, as allegations reflecting upon moral character, and not relevant to the subject, to be expunged from the Record, whether in a suit, or bankruptcy; and without an application.

(93) See ante, Vol. V, 656. *Coffin v. Cooper*, Vol. VI, 514, and the notes.

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 SIMPSON,
Ex parte.

stance occurs in it: an assertion, so clearly not the fact, that it must be attributed to mistake. The best course, that can be taken, is to order the person, against whom this Petition is presented, to pay the costs, actually out of pocket; and that, after payment of those costs, the affidavit shall be taken off the file, as irrelevant and scandalous.

The Order directed the solicitor, who made the affidavit, within fourteen days to pay the costs of the application, and all the costs, out of pocket, to be taxed as between solicitor and client; and that after payment of those costs the affidavit should be taken off the file (94).

(94) *Anon. 3 Ves. & Bea.* given upon this ground as
 93. In *Ex parte Stewart*, between attorney and client;
 2d September, 1816, the Lord and he had found a precedent
 Chancellor ordered an affidavit for that as long ago as Lord
 in bankruptcy to be taken *Hardwicke's* time; though it
 off the file for scandal and im- had been doubted in his own
 pertinence, with costs; which time.
 his Lordship said, are always

In *Hilary* Term 1809 Mr. THOMSON was appointed a Master in Chancery upon the resignation of Mr. POPHAM.

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DEWDNEY, *Ex parte*.
SEAMAN, *Ex parte*.

1808.
Dec. 22d, 23d.
1809.
Jan. 31st.
Feb. 3d.

THE first of these Petitions, presented by the assignees of *Benjamin Dewdney*, a bankrupt, stated, that for several years, previous to 1793, and afterwards, the bankrupt was employed by *Edward Roffey*, farmer, as agent in buying and selling cattle. In 1793 upon a settlement of accounts between them a balance of 900*l.* appeared to be due to *Roffey*; for which sum the bankrupt gave his promisory note, dated the 28th of March, 1793, payable on demand to *John Roffey* or order, with interest at 4*l.* 10*s.* *per cent.* The bankrupt continued to act as agent for *Roffey* until his death in 1797; and, as they were upon terms of great intimacy, never made any charge, or received any payment or satisfaction, during the life of *Roffey* or since his death on account of such agency: nor was any demand made for payment of the note: nor any payment made on account of either principal or interest. The Commission • issued in 1805. The bankrupt in his examination took no notice of the note; believing, that *Roffey* never meant to claim under it; and intended, that it should be considered as given up. After two dividends of seven shillings and five shillings had been made, and the bankrupt had received the sum of 250*l.*, as his allowance, at a meeting in 1807, for the purpose of declaring a final dividend, a claim was brought forward by

A debt, which could not be recovered in an action against a plea of the Statute of Limitations, nor in Equity by analogy to it, not admitted under a Commission of Bankruptcy.

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 DEWDNEY,  
*Ex parte.*  
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by *John Roffey*, as one of the administrators of *Edward Roffey*, to be admitted to prove 1293*l.* 3*s.* 9*d.* for principal and interest, due on the promisory note. The diuidend being adjourned, at a subsequent private meeting the claim was allowed; and the proof was afterwards admitted. No evidence was produced of any acknowledgment, or any other circumstance, that would take the note out of the Statute of Limitations. The Petition therefore, suggesting, that the debt was completely barred by the Statute long before the attempt to set it up, and that from the circumstances there was every reason to believe, that *Edward Roffey* considered the debt as satisfied, and never meant to claim it, prayed, that the proof should be expunged.

The bankrupt by his affidavit confirmed the facts, alleged in the Petition; stating particularly, that he, being upon very intimate terms of friendship with *Edward Roffey*, did not during the whole time the deponent acted as agent make any charge for his time and trouble; or receive during *Roffey's* life or since his death any sum of money whatsoever in payment or satisfaction for his time and trouble in transacting such business; and *Edward Roffey* did not from the time, when the deponent gave him the note to the death of *Roffey* demand payment of the note: nor was any part thereof paid: nor was any interest thereon ever paid after the 28th of *March*, 1793; and that no evidence was produced to the Commissioners of any acknowledgment, or  
 [ \*481 ] \*other circumstance, to take the note out of the Statute; and the deponent had every reason to believe, that *Edward Roffey* considered the debt as satisfied; and never meant to claim or set up any demand for it against the deponent.

The affidavit of *John Roffey* stated, that in *March*, 1807, the note was found among some papers, which had  
 not

not been previously inspected; that, the deponent producing the note to the bankrupt, and charging him with dishonesty in taking advantage of the accident, that the note was not sooner produced, he seemed very much confused and agitated; but did not give the least intimation, that it had been in any manner satisfied; and the deponent at the same time produced a memorandum, found with the note; whereby it appeared, that three years interest on the note had been accounted for to *Edward Roffey* by the bankrupt; which memorandum was dated the 28th of *March*, 1796; signed by the bankrupt; and admitted by him to be in his hand-writing.

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DEWDNEY,  
*Ex parte.*  
SEAMAN,  
*Ex parte.*

The prayer of the other petition was to be admitted to prove under a Commission of Bankruptcy in respect of a debt, secured by several promisory notes, expressed to be payable to the petitioner or order seven days after sight, with interest; upon all which the time, limited by the Statute of Limitations had expired.

Sir *Samuel Romilly* and Mr. *Wetherell*, in support of the first petition.

This petition raises two questions: first, whether the Statute of Limitations (95) could be set up as a defence against an action for the amount of this note: if it could, \*secondly, whether it forms an objection to the proof of the debt under the Commission. With regard to the first question this is a debt, payable on demand; and acknowledged by payment of interest for three years. That makes it unquestionably an absolute debt. Upon the affidavits there is no colour for any new *assumpsit* within the period, fixed by the Statute: the creditor, stating only that the debtor looked confused, does not bring it within the decisions upon that point: extravagant,

[ \*482 ]

as

(95) Stat. 21 *Jam.* I, c. 16, s. 3.

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as they are (96); and the bankrupt states, that no demand was made upon him; that he had a counter demand; and his belief was, that the holder of the note considered it given up.

The decision of the second point involves the most important consequences. If, in the instance of a debt by simple contract, the assumpsit, to which the Statute might be pleaded, is so far not barred, that it may be revived by taking out a Commission of Bankruptcy, the effect is, that with regard to persons, engaged in trade, the Statute of Limitations has no existence. By taking that course the creditor may make available a debt, which according to the usual course of Law is entirely gone. A trader, retiring from business, aware of the Statute, and relying upon the faith of the Law, may have destroyed all his receipts and vouchers; yet any creditor by taking out a Commission might revive all those debts. Why are not debts, contracted during infancy, equally capable of being proved? That and other analogous cases depend upon the true principle of the Statute; which is, that a debt, for which no demand has been made for a considerable time, may be presumed to have been satisfied; though the evidence may have been destroyed; and the time has been fixed at six years. It

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\* is not to be supposed, according to a common notion, that the Legislature intended to enable a man to defraud his creditors, by a positive Law providing the means of resisting an honest, conscientious, claim. The debts, intended to be thus barred, are those, which may be presumed to have been satisfied. With that object the Statute is a legislative declaration, that at the expiration of six years, if no step to enforce the demand has been taken, and no acknowledgment of the debt made, it shall be considered as extinguished. Upon that principle all

cases,

(96) See *Baillie v. Sibbald*, ante, 185.

cases, having any analogy to this, proceed. This Statute has received, not a strict, but, as a remedial Law, the most liberal construction. Suits in Equity are not mentioned in the Statute: yet, where a demand upon simple contract can be enforced in Equity only, or, if a Court of Equity has a concurrent jurisdiction, the benefit of the Statute of Limitations may be had by plea, as at Law. The true criterion, upon which the proof in bankruptcy depends, is, whether the demand may be recovered either by action or Bill in Equity; and the omission of Commissions of Bankruptcy in the Statute can no more be a reason, in this branch of the jurisdiction, that advantage should not be taken of the lapse of time, than the omission of suits in Equity is in the other.

By the early Bankrupt Acts the remedy, given to the creditors, was by no means a matter of right; but depending entirely upon the discretion of the great Officers of the Crown; who personally exercised that authority under the Statute of *Henry VIII* (97), which was by the Statute of *Elisabeth* (98), delegated to Commissioners; still however continuing the effect merely of an application to the discretion of the Great Seal, upon complaint \* made in writing: the amount and nature of the debt, and the circumstances enabling the creditor to have a Commission, as matter of right, remaining undetermined by any Statute previous to the reign of *George* the Second. As the Law now stands, the petitioning creditor, executing the bond to the *Lord Chancellor*, undertakes to prove his debt at Law, if necessary; which he may not be able to do; if this distinction between the remedy under a Commission of Bankruptcy and in a Court of Law is to prevail.

Mr.

(97) Stat. 34 & 35 Hen. VIII, c. 4.

(98) Stat. 13 Eliz. c. 7.

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Mr. *Fonblanque*, Mr. *Hart*, and Mr. *Maddock*, for  
 the Creditor.

The Statute of Limitations is not applicable to cases, arising in the jurisdiction under the Bankrupt Laws, upon this principle; that the debt may be investigated. By the Bankrupt Laws creditors are made subject to several inconveniences: priorities are lost: interest stops; but there is no ground for inferring an intention to exclude a debt, due in conscience. An executor, who is a trustee for those, interested in the estate, has discretion to avail himself of the Statute; or not; as it would be against conscience, that he should oppose the Statute to a demand, which he is satisfied is still due. If he doubts it, by pleading the Statute he discharges his duty. The assignees also, standing in the place of the bankrupt, with a similar duty imposed upon them; for him as well as the creditors, have the same discretion; in the exercise of which they should advert to all the circumstances. Under a devise for the payment of debts a debt, barred by the Statute would be included: *Blakeway v. The Earl of Stafford* (99). *Jones v. The Earl of Stafford* (100); which doctrine, though disapproved by Lord *Hardwicke* \* in *Lacon v. Briggs* (1), and *Ouchterlony v. Earl Powis* (2), was considered by him as established; and was adopted by Lord *Mansfield* in *Trueman v. Fenton* (3). A Legislative provision for the same purpose should receive a similar construction. The payment of debts must be referred to all debts, due in conscience; which could not be intended to be excluded without an adequate reason. This Statute does not apply to suits in the Admiralty and Spiritual Courts; and there is nothing in the nature of the proceedings in bankruptcy, requiring the exclusion

[ \*485 ]

(99) 2 *P. Will.* 373.(2) *Amb.* 231.(100) 3 *P. Will.* 79, see 89.(3) *Comp.* 544; see 548.(1) 3 *Atk.* 105.

exclusion of such a debt. The course of evidence is peculiar: the Commissioners have ample powers to investigate the claim: it is unnecessary therefore to have recourse to the Statute; interposed as a shield from the inconvenience in other jurisdictions, which are prevented in this. The proposition, that the debt is barred by the Statute is not correct. It affects only the remedy; giving the debtor an opportunity of making a particular defence against suits of the description pointed out; confined to those suits; and not applicable to a new remedy, of a different species: the debt, which previously might have been recovered at any time upon competent evidence, still existing, as well in consideration of law, as in conscience.

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*Ex parte.*  
SEAMAN,  
*Ex parte.*

The description of creditors in the Bankrupt Laws is expressed in the most extensive terms. The case of a debtor, who should not have the distribution of his own effects, must have been adverted to, when the Statute of Limitations was passed; and the inference from the silence of the Act is, that the specific remedy alone was to be barred: leaving other cases untouched; with every presumption, that would formerly have been admitted, \*still open. The object of a Commission of Bankruptcy, an equal division of all the effects among the creditors, according to conscience, including equitable, as well as legal claimants, does not require the application of the principle of exclusion, however beneficial as a regulation of private suits between individual parties. The effect would be, that the bankrupt would determine, what debts should, and what should not, be paid.

[ \*486 ]

In the cases *Swayne v. Wallinger* (4) and *Quantock v. England* (5) the objection upon the Statute did not prevail

(4) 2 Str. 746.

(5) 5 Bur. 2628.

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prevail against the petitioning creditor's debt: *Horsley's Case* (6) being considered as no authority; and it was held, that, the debtor himself, who might waive the advantage, not objecting, but having submitted to the Commission, and been examined under it, no other person could take the objection. The law, as it stands upon the two latter authorities, is however confined to the case of the petitioning creditor, whose debt is liable to the objection; which can be made only by the bankrupt himself: the distinction perhaps taken upon the ground, that this Statute should be strictly pleaded; or, that the debt, which is the foundation of this process, at once an action and execution, should be so far established as a legal debt, by permitting the bankrupt to make the same objection, that he might, as Defendant in an action, have raised by plea. If, however the debtor does not raise the objection, it is not competent to the Commissioners to discriminate, and reject, those creditors, against whom the Statute might be pleaded; and it would be singular, if a debt, which might have formed the foundation of the Commission, should be considered incapable of proof under it. An attorney, though he cannot bring an action, \* unless he has delivered his bill according to the Statute (7), may take out a Commission of Bankruptcy for his fees; while his bill is under taxation by Order; according to the case in *Moseley*.

[ \*487 ]

If however the Statute of Limitations is to have effect in bankruptcy, this debt may be sustained upon the form of the security: a note payable on demand; upon which no cause of action accrues until demand: the only period, at which the Statute can begin to operate: to be referred in this instance to the time of the act of bankruptcy

(6) *Moseley*, 37: reported  
 without a name.

(7) Stat. 2 Geo. II. c. 23.  
 s. 22.

ruptcy committed: the Commission being considered an action and execution in the first instance by all the creditors.

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*Ex parte.*

Sir *Samuel Romilly*, in Reply.

There is a great variety of debts that will support a Commission of Bankruptcy, to which the Statute of Limitations will not apply: no inference therefore can be drawn from the silence of the Statute with respect to Commissions of Bankruptcy. As to the case of a deed of trust, there is considerable doubt, whether that is now the established law of this Court; and it is extremely difficult to find the principle of that doctrine. It proceeds upon a presumption, that the Statute of Limitations has laid down a false and erroneous rule; supposing, that no presumption, that the debt has been satisfied, arises from the length of time: the Statute on the contrary proceeding upon the supposition, that such a presumption is irresistible. The construction in those cases is, that the party means to provide for the payment of all his debts: but the question, what are his debts, remains; and according to the Statute of Limitations those are not his debts, which from the length of time, fixed by that Statute, are presumed to be satisfied. The fact, that they are not satisfied, which cannot be proved, is assumed: but the Court might with equal consistency assume, and assign as the reason, that the party meant to pay the same debt twice. The only proper course is to avoid the Statute by proving some assumpsit within six years. Lord *Kenyon*, as well as Lord *Hardwicke*, expressed strong dissatisfaction with the rule, as stated in *Peere Williams*; that a trust for the payment of debts will sustain a claim against the Statute of Limitations.

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Mr. *Richards* (*Amicus Curiae*) said, Lord *Altonley* had expressed the same opinion.

*The*

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*The Lord CHANCELLOR.*DEWDNEY,  
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*Ex parte.*

As to reviving  
a debt, within  
the Statute of  
Limitations,  
under a trust  
for debts,  
*quare.*

Sir *Thomas Sewell* shook that doctrine upon the principle you are now supporting; holding, that a trust for payment of debts would revive a bond after the expiration of twenty years; and stating, as the reason, that he did not see, why it should not be so, if it would revive a debt, which the Legislature presumed to have been satisfied. That decision was afterwards held to be wrong.

Reply.

In *Quantock v. England* the question was, who should make the objection, so as to affect the validity of the Commission: but an objection to the proof of a debt may be taken, not by the assignees alone, but also by any of the creditors; who are their *cestuis que-trust*. It may be insisted upon by any person, standing in the place of the bankrupt, and in this instance the objection is made by the assignees. That case therefore is no authority for this. The case of an attorney, taking out a Commission, though he has not delivered his Bill, has no analogy to this question. The delivery of the bill is required, that the Defendant may be enabled to take a proceeding for the purpose of having the amount ascertained; but a Commission of Bankruptcy, in its nature an extremely summary proceeding, does not admit that delay: dispatch being of the utmost importance in preventing preference and other fraudulent proceedings.

[ \*489 ]

This debt cannot be represented as becoming due only upon the bankruptcy: a debt by a note, payable on demand, and become an absolute debt at least by the payment of interest for three years.

*The Lord CHANCELLOR.*

Attorney may  
take out a  
Commission of  
Bankruptcy  
upon his Bill before taxation.

The case of the attorney depends upon this; that, a Commission of Bankruptcy being a prompt remedy, the  
object

object would be defeated by waiting a month (8). Upon this point there is a great deal of negative evidence; as I have reason to believe, creditors have in many instances been refused upon this objection, and there has been no appeal from the judgment of the Commissioners. I understand, some cases may be found in the office, which are supposed to bear upon it; and, the search not being completed, these Petitions must stand over.

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*Ex parte.*

*The Lord CHANCELLOR.*

The first of these Petitions, by the assignees under a Commission of Bankruptcy, praying, that a sum of money, which has been proved as a debt under the Commission, may be expunged, admits, that the debt has not been paid; unless it was satisfied by work and labour of the bankrupt; which must have been executed between *March*, 1793, and the death of the creditor in 1797. Considering the special nature of the allegation in this Petition, admitting upon the face of it, that the debt is not paid, unless it has been in the manner stated, which must have taken place in that period of four years, between 1793 and 1797, it would be too much to hold, that the creditor should not be at liberty to bring an action; to try, what would be the effect of a plea of the Statute of Limitations, where it is admitted, that the debt has not been paid, but was satisfied in the manner, stated in this Petition. If however the law in bankruptcy is, as is contended, it would be improper to put the parties to an action, for the purpose of ascertaining, whether  
a plea

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*Jan. 31st.*

[ \*490 ]

(8) *Ex parte Sutton*, ante, *Alephsin*, XVI, 470, this objection was not taken to the Vol. XI, 163, and the note, 165. Post, XVI, 166. For debt, on which the Writ of the same reason in *Jones v. Ne exeat Regno* had issued.



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*Ex parte.*  
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*Ex parte.*

a plea of the Statute would be a bar; when in the administration of justice in bankruptcy the Statute would not avail the bankrupt, or any person representing him.

This point depends, first, upon practice; secondly, upon decision; thirdly, upon principle, and a fair construction of the Statutes of Bankruptcy. It is represented to me, that a difference of practice prevails; that under many Commissions the allegation, that the debt is barred by the Statute of Limitations (9), has been considered sufficient to prevent the proof; and that the opinion of other Commissioners is, that advantage cannot be taken of that Statute, as among the creditors: or, as Sir *James Mansfield*, arguing the case of *Quantock v. England* (10), puts it, the oldest debt may be proved, if a Commission issues. There is not much weight of practice on either side. Many such debts have been proved; and there has been no great struggle to have the proof struck out: but where, the proof being tendered, the Statute is stated as a bar, the admission of it under those circumstances, submitted to, is rather a stronger act than the admission in the other case without any attempt to expunge it.

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I have not been able to find any other decisions than those which have been cited; and I cannot think that there is any considerable weight in them; or, that they go so directly to the point as to afford a satisfactory ground for deciding this question upon them, as authorities. The earliest case in point of date is *Swayne v. Wallinger* (11); which determines only, that, if assignees in bankruptcy bring an action against a person, who

(9) Stat. 21 Jam. I. c. 16.  
 s. 3.

(10) 5 Burr. 2628. 2 Black.  
 702.

(11) 2 Str. 746.

who is a debtor to the estate, and the Defendant can say no more than that the debt of the petitioning creditor under the Commission is above six years old, he cannot say that with effect. That goes no great length to decide this point; the question, whether the Statute of Limitations can be effectually pleaded against a security, upon the face of it more than six years old, depending not merely upon the date: secondly, if neither the bankrupt, nor the creditors, having interests under the bankruptcy, make the objection, there is no reason for permitting a third person, indebted to the estate to nonsuit the assignees by merely shewing the original date; as the demand may be supported by a new assumpsit, as a perfectly good debt; and, if not, there is no reason, why a third person should be allowed to take this advantage.

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DEWDNEY,  
*Ex parte.*  
SEAMAN,  
*Ex parte.*

The case of *Quantock v. England* is reasoned thus in the Report in *Blackstone* (12); that the Statute will not vitiate the Commission by annihilating the petitioning creditor's debt: "the debt is not considered as extinguished by the Statute; but only *barred* of its usual remedy: and no objection can arise, if the debt is not *barred* at the time of the act of bankruptcy committed."

That expression occurs so universally in every case, that it is to little purpose at this period to observe, that \* it is not altogether correct. In many instances this defence is given to debtors, who have not paid: but the Statute was made for the benefit of those, who might have paid; though they cannot prove the fact. The debt may, or may not, be gone; and the principal does not warrant the assumption of the fact universally, according to

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*Ex parte.*

to this expression. The debt is not barred by the Statute: but it may be barred by the fact, that there is no new *Assumpsit*. The reasoning of Counsel is more fully stated in *Burrow* (13). The Court observe, according to the Report in *Blackstone*, that the Statute extinguishes not the debt, but the remedy: for the least hint will revive it; and it lies only in the mouth of the debtor himself to take advantage of it; he might have applied to supersede the Commission, if he had thought proper: but, not having done so, his debtor should not be permitted to avail himself of it, in order to elude the payment of a just debt to the assignees.

The Report of *Burrows* states, that the Judges of that day, of great authority, held; that the objection could be made only by the bankrupt himself; and that he had waived it by submitting to the Commission; and therefore the objection was not competent to a third person. On the other side it was insisted, that under a Commission of Bankruptcy the intent and spirit of the Statute of Limitations must be regarded; which meant equally to bar all concurrent jurisdictions; and *Horsley's Case* (14) was relied on; where upon an application to supersede a Commission on the ground, that the debts of some of the petitioning creditors were liable to objection upon the Statute of Limitations, the opinion of the *Lord Chancellor* of that day was, according to the Report, that such an objection might be maintained as against the petitioning creditor, or the proof tendered by any other creditor under the Commission; and proposed an issue upon that point in such a form, that the question upon the plea of the Statute, as applicable to bankruptcy, might be determined: but it was given up; and the Commission was superseded.

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Though

(13) 5 *Bur.* 2678.

(14) *Mos.* 37.

Though that case was cited from the *Register's Book*, by which the *Lord Chancellor's* opinion appeared to be, that the objection would prevail against the petitioning creditor, *Lord Mansfield* still disputed the authority of the Report: but it is more material, that the subsequent case of *Quantock v. England* concludes with the unanimous opinion of the Court of King's Bench, that it would be competent to the bankrupt to make advantage of this Statute; which must be the conclusion; when they say, that it is not competent to a third person: and that the circumstance of his submitting to the Commission would be an acknowledgment of the debt. In a subsequent case, *Fowler v. Brown* (15), *Lord Mansfield* takes the more broad ground, that the Statute of Limitations does not prevent a creditor from taking out a Commission of Bankruptcy; extending only to the remedies by action, mentioned in the Statute; but does not extinguish the debt; or take away any other remedy; which goes this length; that a Commission of Bankruptcy is a legal remedy for the recovery of debts, to which, not being mentioned in it, the Statute of Limitations does not apply; and therefore it is not competent, either to the bankrupt or any other person to set up the Statute against the petitioning creditor or any other creditor. I cannot however consider that *dictum* at *Nisi Prius* as an authority, overthrowing the unanimous judgment of the Court in the other case.

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SEAMAN,  
*Ex parte.*

Considerable argument might have been submitted to the Judges, who determined that case, with regard to the question, whether their decision was put upon the right point. The questions ought to have been considered, what should be the decision, if the bankrupt does not submit to the Commission! if he submits no farther than  
he

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(15) 1 *Cooke's Bank. Law*, 13; 8th edit. 21.

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*Ex parte.*

SEAMAN,

*Ex parte.*

Though a  
Bankrupt dies,  
not having sur-  
rendered, the  
Commission  
may proceed.

he is compelled; or if he cannot submit to it: if, for instance, he dies, not having surrendered; in which case the Commission may proceed (16). Does the Court mean, that creditors, coming forward, could not remove the Commission, which the bankrupt could have questioned upon the Statute of Limitations, with a view to take out another Commission upon another debt? Many cases may be suggested, in which it would be difficult to maintain, that a Commission must necessarily subsist, as the bankrupt did not make the objection, which perhaps he could not possibly make.

In this way of stating these cases nothing appears to have been decided, which governs the present point; which is now to be regarded as open for discussion; and must be considered with reference to what the Statutes have enacted; what will be the state of the Law in many cases, that may be put, if the Statute of Limitations does not apply; and to the office and duties of this jurisdiction in bankruptcy. A Commission was clearly a proceeding *ex Debito Justitæ* long before the Statute (17), which regulates the security to the Great Seal. It is however extremely material to look into the old Statutes as to the situation of the bankrupt with regard to his property and liberty. The discharge upon conformity (18) was not given to him until long after the Statute of Limitations: on the contrary, the Bankrupt Statutes, down to that period (19), have an express declaration, that, if the property does not satisfy all the debts, the creditors shall

[ \*495 ]

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|--------------------------------------------|---------------------------------------------------------------------|
| (16) Stat. 1 <i>Jam.</i> I, c. 15, s. 17.  | s. 10. By the Stat. 1 <i>Jam.</i> I, c. 15, s. 3, the like benefits |
| (17) Stat. 5 <i>Geo.</i> II, c. 30, s. 23. | and remedies were given                                             |
| (18) Stat. 4 <i>Ann.</i> c. 17.            | against bankrupts as are pro-                                       |
| Stat. 5 <i>Geo.</i> II, c. 30, s. 7.       | vided by the Statute of <i>Eliza-</i>                               |
| (19) Stat. 13 <i>Eliz.</i> c. 7.           | <i>beth.</i>                                                        |

shall have their remedy against the bankrupt for the deficiency; as if no such proceeding had taken place.

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DEWDNEY,  
*Ex parte.*  
SEAMAN,  
*Ex parte.*

If the Statute of Limitations is to have no effect with regard to a Commission of Bankruptcy, as that proceeding is not mentioned in the Act, this consequence must follow; and would have produced a very singular case, until the Statute of *Ann.* (20) gave the discharge. The creditor would have received under the Commission a part of his debt; and, having the same remedy for the remainder, as if no Commission had issued, his action would have been met by the Statute. That consideration among many others furnishes a ground for concluding, that the real meaning of the Legislature in these acts, requiring the *Lord Chancellor* to give execution to all the creditors, was, that this species of execution should be given to those creditors, who, if a Commission had not issued, could by legal or equitable remedies have compelled payment.

Consider, how this stands with regard to convenience another way. A man retires from trade; and, as any subsequent act of bankruptcy, at least during the existence of any debt, contracted while he carried on trade, may be the foundation of a Commission (21), if the Statute of Limitations cannot be set up against the petitioning creditor, at the distance of ten years, when there may not be in existence any document to prove payment, a person, who can bring no action, who has no remedy, legal or equitable, may sustain a Commission. It goes much farther. Under that Commission, so taken out, one hundred creditors may receive payment upon debts, which the Statute supposes may not be due; though not one of

Act of Bank-  
ruptcy by a  
man, who had  
retired from  
trade, but  
during the ex-  
istence of a  
debt, contract-  
ed while in  
trade, will sus-  
tain a Commis-  
sion.

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(20) Stat. 4 *Ann.* c. 17.

(21) *Ex parte Bamford*,  
ante, 449.

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DEWDNEY,  
*Ex parte.*SEAMAN,  
*Ex parte.*Jurisdiction in  
Bankruptcy  
legal and equitable.Effect of time  
in Equity by  
analogy to the  
Statute of Limitations.

of them could have maintained an action or a suit in Equity against the bankrupt. The jurisdiction of the *Lord Chancellor* in bankruptcy is constantly exercised, as both legal and equitable. Equitable debts are not expressly provided for: but the Statutes are construed upon this principle, that they provide another mode of enforcing legal and equitable remedies. The Statute of Limitations does not apply to suits in Equity: but it has been held, that by analogy time may be pleaded with the same effect. It would be singular, that, equitable debts being let in upon equitable principles, and by analogy made subject to the Statute of Limitations, legal creditors, coming here, should not be affected by that Statute. The argument must go to this extent; that legal debts are not affected by time in bankruptcy.

The effect of  
the Statute of  
Limitations not  
discontinued  
by Bankruptcy.

The origin of this is, that to the assignment, as a transaction, proceeding under an act of the Legislature, the consent of all persons; affected by it, is implied. In one view that is quite apparent from the history of the Law upon this subject. The assignment was long understood as being a new assumpsit upon the part of a debtor to the estate. There are upon that point cases in *Levinz* and *Comyns*; and one in *Modern Reports*; where Lord Chief Justice *Holt*, differing from the other Judges, lays down, that the assignment under the Statute is to be considered, not as an assignment of the debt, involving the consent of the debtor, but as an assignment of the cause of action; and so lately as the case of *Gray v. Mendex* (22) it was determined, that the Statute of Limitations runs notwithstanding a Commission of Bankruptcy. The law would also be in a very singular state in this respect; that all debtors to the estate would have the benefit of this Statute; and yet creditors of the estate

[ \* 497 ]

estate would not be met by it: a consequence, which a Court of Justice would very reluctantly admit. Another inconsistency is obvious upon the doctrine of election: a creditor, having two remedies, would be met in his action by the Statute; which would have no effect against his concurrent remedy.

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DEWDNEY,  
*Ex parte.*  
SEAMAN,  
*Ex parte.*

The true question is, whether the object of this jurisdiction is not to give effect to those claims, which, if a bankruptcy had not taken place, could have been enforced in some suit, legal or equitable. A devise for the payment of debts may, as has been said, revive the remedy: but the ground is, that the testator is understood to intend, that it shall be revived: how correctly, I admit with Sir *Samuel Romilly*, is extremely questionable (23). Testators would be much surprised, if aware, that in the administration of their affairs debts, which they supposed, perhaps knew, to have been discharged long before, would be considered as intended to be again paid, if they should die without evidence of the payment. That however goes upon the supposed intention to create a trust for all debts; putting the Statute out of consideration; and I cannot admit, as a correct conclusion from that supposed case of the voluntary creation of a new *Assumpsit*, the case of a man, who does not create a trust, but against whom the law raises a compulsory trust by the assignment under a Commission of Bankruptcy.

As to reviving a debt, within the Statute of Limitations under a devise for debts, *quære*.

The inconvenience has been urged, that it will depend upon the bankrupt (24), what debts shall, and what shall not, be paid: but that inconvenience is not so great as those on the other side; and it happens continually in the administration of assets. Neither does it follow, that, as the objection was not taken to the petitioning creditor's debt,

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(23) *Post*, Vol. XIX, 470. (24) Under the sanction of *Burke v. Jones*, 2 *Ves. & Bea.* an oath.



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DEWDNEY,  
*Ex parte.*SEAMAN,  
*Ex parte.*

Executor not bound to plead the Statute of Limitations: but after the Decree the objection may be taken against other creditors, coming in before the Master.

debt, it may not be taken to all other old debts; and they must be paid. In the administration of assets under a creditor's bill executors are not bound to plead the Statute of Limitations; and, if they do not, the creditor, filing the Bill, will have a Decree on behalf of himself and all other creditors; and will be paid: but the constant course in the Master's Office is to take the objection against other creditors; and to exclude from the distribution those, who, if legal objections are brought forward, cannot make their claims effectual: a case, affording an analogy, which goes directly to the point.

Upon the whole my opinion as to the general point is, that in the consideration of this Statute a Commission of Bankruptcy is nothing more than a substitution of the authority of the *Lord Chancellor*, enabling him to work out the payment of those creditors, who could by legal action, or equitable suit, have compelled payment; and that the objection upon the Statute is competent to the creditors; and may be sustained. I am confirmed in that opinion, recollecting what is done in bankruptcy without any authority by the Statutes; which is to be accounted for only thus; that the *Lord Chancellor* is understood in the distribution to govern himself as to legal debts by the rules of law, and as to equitable debts by the rules of equity; regarding the claim of each creditor as a suit depending. That is the general principle; and the only decision being that case (25) at *Nisi Prius*, contradicted by *Quantock v. England*, I see no reason for holding, that it is not competent to the bankrupt to take this objection; and, if he waives it, to creditors. I go out of my way by expressing this opinion; as in both these cases, if the parties think, that the Statute does not bar their demands, I shall not prevent their trying the question in an action.

[ \*499 ]

The

(25) *Fowler v. Brown*, 1 *Cooke's Bank. Law*, 13. 8th edit. 21.

The other petition, by *Seaman*, is very important, both as to the value, and upon the form of the note. I do not understand, what is meant by a promisory note seven days after sight. I cannot find such a form of a note in any of the books (26); nor any person, who can give me any information relative to it.

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*Ex parte.*  
SEAMAN,  
*Ex parte.*

*The Lord CHANCELLOR.*

One farther observation upon the point, raised by these petitions, had escaped me. Suppose two persons, indebted as partners; and that they could plead the Statute of Limitations to an action. If a creditor, who could be barred in an action, may take out a Commission of Bankruptcy, this consequence would follow. As a joint creditor he might take out a separate Commission against one of the partners; and, being the petitioning creditor in that Commission, might receive dividends (27); which upon this argument would not be prevented by the Statute of Limitations; and it is decided (28), that the payment of a dividend under a Commission against one partner, upon a debt within the Statute of Limitations, raises a new assumpsit by the other. The consequence would follow, that, one partner being made a bankrupt, a creditor, who could not from the effect of the Statute maintain an action against the other, might by forcing a dividend raise a new • Assumpsit, upon which he could sue the solvent partner. That cannot be.

1809.

Feb. 3d.

Joint creditor may take out a separate Commission of Bankruptcy; and receive dividends.

Payment of dividend under a Commission of Bankruptcy against one partner raises a new Assumpsit by the other, depriving him of the benefit of the Statute of Limitations.

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[ \* 500 ]

(26) See 1 *Ves. & Bea.* 343. *man*, XIV, 604, and the *Ex parte Koch*, and the note. notes.

(27) Ante, *Ex parte Chandler*, *Ex parte Hall*, Vol. IX, 35, 349. *Ex parte Acker-* (28) *Jackson v. Fairbank*, 2 *Hen. Blacks.* 340.

1808-9.

DEWDNEY,  
Ex parte.  
SRAMAN,  
Ex parte.



An Order was pronounced in each case; giving the creditor liberty to bring an action; to be defended by the assignees; not setting up the bankruptcy (29).

(29) This decision confirmed by the Lord Chancellor, *Ex parte Roffey*, post, Vol. XIX, 468, on a rehearing of the petition, *Ex parte Dewdney*, and a subsequent petition, under which an Order was made for refunding a dividend, which had been received, 2 *Rose's Bank. Cas.* 59.

ROLLS.

1808.

July 18th.

## CAMPBELL v. PRESCOTT.

Construction of a trust, by deed, of money to accumulate, until the grantor's grand-children, then living, or to be born, respectively attain twenty-one; and on attaining, &c. to pay to each, as

**BY** indenture, dated the 24th of June, 1751, *Jacob Elton* assigned a sum of 10,000*l.* secured by the bond of *George Prescott*, upon trust to receive and accumulate the interest for five years from the date of the bond; and after the expiration thereof to pay the interest, &c. to his daughter *Mary*, the wife of *George Prescott*, for her separate use; and, in case she should outlive *George Prescott*, to pay her 2000*l.* out of the interest for the five years: but in case she should die before him, then the sum produced by the interest for five years to be upon the same trusts as the capital of 10,000*l.*; and after the expiration of the five years upon trust they should respectively retain such age their respective shares; to be ascertained by the number in being as they respectively attain twenty-one without regard to such as might afterwards be born.

No interest vested until payment: the measure of distribution is the number existing at each period: those, who had received, have no farther claim upon the fund, increased by shares falling in: therefore, one dying under twenty-one, after all the others had either received their shares, or died under twenty-one, that share is undisposed of by the deed; and passed by a bequest of "all effects whatsoever," following specific descriptions of property.

trust to accumulate the interest of the 10,000*l.*, until the grand-children of him *Jacob Elton*, as were then living or should after be born, viz. the children of *Abraham* and *Isaac Elton* and *Mary Prescott* should respectively attain their respective ages of twenty-one years; and on such grand-children attaining their respective ages of twenty-one years upon trust to pay unto such grand-children respectively as he, she and they, should respectively attain unto such age, his, her and their, respective shares or proportions, not only of the said 10,000*l.*, but of all interest for the five years, and to the sole use of such grand-children respectively: each of such grand-children's share or proportion of the 10,000*l.*, and of the interest, &c., that should have arisen and been made therefrom, to be ascertained according to the number of grand-children of *Jacob Elton* as should be in being as they should respectively attain their respective ages of twenty-one years as aforesaid without any regard had to any such as might afterwards be born.

There were ten grand-children: all infants at the date of the assignment: viz. *Mary*, the daughter of *Abraham Elton*: *Abraham*, *Isaac*, *Jacob*, *Edward*, *Mary*, and *Elizabeth*, the six children of *Isaac Elton*: *Sir George William Prescott*, *Thomas*, and *Mary Prescott*, the children of *Mary Prescott*. All the grand-children, except *Elizabeth Elton* and *Mary Prescott*, attained the age of twenty-one; and received their respective shares several years ago. *Elizabeth Elton* died, an infant, after all the others, except *Thomas* and *Mary Prescott*, had attained twenty-one; and, upon her death a suit being instituted, a Decree was pronounced in 1769; declaring, that the share of each of the grand-children, as they shall severally attain the age of twenty-one, ought to be ascertained by the number of grand-children then in being, and under twenty-one; and that each, as he or she

should

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should attain that age, would be entitled to his or her share: the residue from time to time to be divided by the like rule, as each should attain that age; and directing, that all, who had received or should receive their shares, should execute general releases to the obligor in the bond and to the trustees.

Mary Prescott, the grand-daughter, died, an infant, after all the other grand-children, except *Elizabeth Elton*, had attained twenty-one, and after the deaths of *Abraham*, *Jacob*, and *Elizabeth Elton*: Afterwards, in 1790, *Isaac Elton*, the grand son, died. *George Prescott* died; leaving *Mary*, his wife, surviving; who died in 1792; leaving her son, *Sir George William Prescott*, her executor.

The bill in this cause was filed in 1796 by the executors of *Isaac Elton*, the grand son, being also the personal representatives of *Jacob Elton*, the grand father; and in the latter character claiming to be entitled upon the death of *Mary Prescott* to her share of the fund.

Sir George William Prescott by his answer claimed the whole fund as the personal representative of *Mary Prescott*. *Edward Elton* and *Thomas Prescott* by their answers claimed with *Sir George William Prescott*, as the only grand-children living at the death of *Mary Prescott*; or, if not so entitled, claimed a distribution of the fund among all the grand-children, who attained the age of twenty-one, *per Stirpes*.

Another question was raised by the answer of the widow of *Jacob Elton* the grand father; insisting, that the share of *Mary Prescott*, the grand-daughter, did not pass by his Will, dated in 1795; by which he confirmed
 the

the assignment of the bond; and gave to his son *Abraham* and *Isaac* all his sugar-house cupola and merchandise stock with jewels plate household goods furniture and all effects whatsoever; and appointing them executors; and that the said share was divisible among the grand-children, who attained the age of twenty-one, or among the donor's next of kin.

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The cause stood for judgment.

The MASTER of the ROLLS.

What I wished to ascertain by an attentive perusal of this deed was, whether it contains any thing, which can be construed to give the whole trust fund to the grand-children of *Jacob Elton*; or, at least, to such of them as should attain the age of twenty-one: if so, they will be entitled to the benefit of the trust; though a mode of distribution is prescribed, that does not completely exhaust the fund: but, if there is no gift to them, except in the direction to pay (30) to such of them as shall attain twenty-one a given share, in a given mode, it is difficult for any grand-child, who has received such share, to maintain a farther claim; though in the event, that has happened, part of the fund shall remain unapplied. The question is, not, what he would have done, if it had occurred to him, that there would be a surplus remaining unappropriated, but, whether by what he has done he has given the grand-children a claim to that surplus.

In the construction of this deed it is to be ascertained, what are the intents, and purposes, thereafter expressed, to which the recital points. The question is, what extent of benefit is afterwards conferred upon the grand-children by this deed. After making a provision for *Mrs. Prescott*, he directs the residue to accumulate, until the


(30) *Batsford v. Kebbell*, ante, Vol. III, 363, and the note, 364.

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the grand-children attain twenty-one; and then comes the direction with regard to the distribution of the fund. When they shall respectively attain twenty-one, the trustees are to pay each of them his, her, or their, respective shares of this fund. What is to be the respective share and proportion, to which each is to be entitled? Such share, &c. to be ascertained according to the number of grand-children as shall be in being, as they shall respectively attain their respective ages of twenty-one, without regard to any future grand-children, who might be afterwards born.

Thus, as soon as any grand-child attains twenty-one, the mode is prescribed, in which his share is to be ascertained; and the testator clearly conceived, that upon the very day, on which the grand-child should attain that age, the exact amount of the share would be capable of being ascertained. Then, when payment is received, of what upon such calculation turns out to be his share, what else is there given to him by this deed? What ulterior demand can he have? It had been supposed by the family, that this first distribution was to be made with reference to the number of grand-children then in existence. Suppose, there had been ten; the first therefore taking a tenth: they had conceived, that, as this distribution was made upon the supposition, that there would be nine more, if that did not turn out to be the fact, (one dying under twenty-one), the consequence would be, that the grand-child, who had received only a tenth, would be entitled to so much more as he had given up under the idea, that there would be nine other objects of the distribution. That such was the notion in the family appears from the two receipts indorsed upon the deed; reserving the claim to what might come in future. It was upon that supposition, that the question was made in 1769 upon the share of *Elizabeth*: but it was decided, that

that according to the true construction of this deed a grand-child, who had attained twenty-one, and received his share, had no farther claim by the event of the death of any of the others under that age: the failure of the claim of that one, so dying, being held not to create a new claim by a grand-child, who had received his share. The answer to such claim was, that his share had been paid; that he was out of the question, as much as if the share allotted had been specifically a tenth of the fund, without any provision for survivorship, or any ulterior division; that it was immaterial to him, what became of the remaining nine-tenths. Lord *Camden* considered that so clearly to be the true construction, that he directed, that all, who had received, or should receive, their shares, should execute general releases; not only to the debtors in the bond, but to the trustees. It is equally true at this day, as it was, when the payment was made to the first, who attained twenty-one, that the whole of his share was paid; and the proportion is in no degree affected by the subsequent event. The decision was made on the ground, not that the younger grand-children were intended to have a greater proportion, but that, by the necessary effect of the mode of distribution, pointed out, those, who would take upon the subsequent distribution, were to take the fund, as it happened then to exist. It followed of course, that no regard could be had to the dead grand-children; and those, who were then the objects, were to take the fund, as then constituted; not by survivorship; but as being the only persons then remaining, who had any claim on such fund.

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It occurred to me, that a difficulty might have arisen with regard to the sum of 2000*l.*, to be produced by the accumulation directed during five years, of the interest; which after that period was to be paid to Mrs. *Prescott* during the coverture. If she did not survive her husband, that
 sum

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sum of 2000*l.* was to fall into the other fund. This question then might have arisen, if she had died before her husband, after the distribution of the other fund. It might be said, if the first child attaining twenty-one, is by receiving a share barred from future claim, is it to be contended, that he would be barred from this new fund, falling in by the death of the mother after the period of division? If that cannot be maintained, it is argued, that his receipt of his share is not so conclusive as is represented, against any subsequent claim. No difficulty however arises from that; as the case is expressly provided for by the direction, that the sum of 2000*l.*, produced by the accumulation, shall in the event of her death in the life of her husband be subject to the trusts of the 10,000*l.* It could not be subject to those trusts in any way, except by being distributed, whenever it fell in, precisely in the same proportions, in which the other fund ought to be distributed. A grand-child therefore, who had received his proportion of the first fund, would be entitled to the same proportion of the second fund by the express disposition; and if that grand-child had given an absolute release upon receiving the first payment, it would have extended no farther than to that fund, of which he had received a proportion; and he would still have been entitled to a proportion of the second fund, in which he was intended to share. There is a reservation in Lord *Camden's* Decree of the consideration, how that fund was to be divided; and the direction for general releases must be taken so as to be consistent with the other provision in the same Decree: as applicable to that fund only, which was then in a train of distribution. The Decree has different words as to the two funds; reserving, as to the one, how the same shall be disposed of; as to the other (the accumulation of the 2000*l.*) how the same shall be divided.

Therefore,

Therefore, as to the only fund, that ever became distributable, the grand-children, who attained twenty-one, having received their shares according to the mode, prescribed by the deed, have received every thing they can claim under it. The necessary consequence is, that the surplus belongs to those, who represent the donor.

The next question is, whether that surplus belongs to the next of kin, or to the residuary legatees: that is, whether the latter take it by the express disposition; assuming, that, as executors, they would be trustees; and I think, they do so take. There is no case for the restrictive sense, which the grand-children put upon the general words, "all my effects whatsoever." Lord Mansfield says, the word "effects" is equivalent to "property" or "worldly substance (31)." The Plaintiffs are therefore entitled to a Decree.

(31) *Hogan v. Jackson*, *Hotham v. Sutton*, ante, 319. *Courp.* 299. *Michell v. Michell*, 5 *Madd.* 69. Unless restrained; ante, *Rawlings v. Tournay*, III, 311, and the *Jennings*, Vol. XIII, 39. note, 314.

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The word "effects" in a Will equivalent to "property" or "worldly substance."

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BY articles, dated the 18th of January, 1763, upon the marriage of *Isaac Elton* the younger, and *Sarah Peach*, reciting a covenant for payment of a portion of 5000*l.*, *Isaac Elton*, the father, and the son, covenanted, that the executors and administrators of *Isaac Elton* the younger, should within the space of three months next

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Though generally a satisfaction by Will of a portion must be of the same nature, and equally after certain, a bequest of a

share in powder-works, to be made up in value 10,000*l.*, charged with an annuity of 20*l.* for a life, was held a satisfaction of a portion of 2000*l.*

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after his decease pay or cause to be paid to the trustees the sum of 2000*l.*, with interest for the same, from the death of *Isaac Elton* the younger; upon trust to place the same out at interest, and the dividends and interest therefrom arising to pay to *Sarah Elton* for her life; and after her death to pay the dividends and interest of the said 2000*l.* unto and for the benefit of the younger children, if more than one, whether sons or daughters; and, if no younger son or sons, then for the daughters or daughter only of *Isaac* and *Sarah Elton*, in such shares or proportions as *Isaac Elton* the younger by Deed or Will should appoint; and, in default of appointment, then equally between such younger children, if more than one, until they should attain their respective age or ages of twenty-one years, if sons or a son, but if daughters or a daughter, the said age of twenty-one years or day or days of marriage; and, in case there should be only one child of said intended marriage, then to and for the benefit of such only child, until he, if a son, should attain his age of twenty-one years, and, if a daughter, the same age of twenty-one years, or day of marriage, which should first happen; and upon all and every such said younger children, or child, his, her, or their, attaining his, her, or their, respective ages of twenty-one, or, if daughters or a daughter, the same age or marriage, then to pay and distribute said principal sum equally between all and every such younger children or daughters only (if more than one), as they, if sons, &c. should attain twenty-one, or, if daughters, at that age or marriage, according to the appointment of *Isaac Elton*, or, in default of appointment, equally; and in case of one only child then upon trust to pay said 2000*l.* to such only child, if a son, at his age of twenty-one years, or if a daughter, on her attaining that age or day of marriage; and in the event of no children, &c.

to

to the wife, surviving, or, if she should be dead, to the executors of the husband.

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The settlement contained a proviso, that, in case *Isaac Elton*, the younger, should in his life-time advance any sum of money for the placing out or promoting or setting up in the world any of the younger sons or son to or in any profession or trade or for the portioning or advancing any daughter or daughters in marriage, then that such sum or sums, so to be advanced by *Isaac Elton* the younger, should be deemed and taken, if equal to or more than such younger son or sons', daughter or daughters', share of said 2000*l.* in full of his or her share of that sum; but, if less, then as part of his or her share of such 2000*l.*; unless *Isaac Elton* the younger should by Will or any writing, &c. declare to the contrary; and, after the death of the father and mother, grandfather and grand-mother, that the trustees might, if need should require, apply a reasonable part for placing out in the world to some profession or trade any younger son or sons.

*Sarah Elton* died in 1763; leaving her husband surviving, and one son, *Abraham*, their only issue; who attained the age of twenty-one in 1784. His father did not during his life pay the 2000*l.* or any part: or make any advancement for his son farther than by the expence of his maintenance and education. *Isaac Elton* married again; and had children by that marriage. He died upon the 31st of *March*, 1790; having by his Will devised to his son *Abraham* certain real estates; and bequeathed to him all his capital share interest and concern in certain powder works, to hold to him, his executors, &c.; and he gave him such sum and so much money as, being added to the capital of the said powder-work concern at the last settlement before the testator's decease, should  
make

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make up in the whole the full and complete sum of 10,000*l.*: he *Abraham Elton* paying thereout to Mrs. *Prout* for life 20*l.* a-year. The testator also gave to his son *Abraham* a leasehold house, held for lives, or years determinable on lives. *Abraham Elton* had under the Will of his grand-father a considerable provision; consisting of 5000*l.* besides some estates; to which his father's Will referred.

The Bill, filed by the executors of *Abraham Elton*, prayed payment of the sum of 2000*l.*: and the question was, whether the covenant was satisfied.

Mr. *Alexander*, Mr. *Hart*, and Mr. *Roupell*, for the Plaintiffs.

This is a question of satisfaction by the Will of a father of a provision for his son under a settlement. The doctrine of satisfaction, originally between debtor and creditor, as it has been since applied to portions, requires in that instance, though not the same precision, a certain degree of resemblance in the provision substituted: as Lord *Hardwicke* in *Bellasis v. Uthwatt* (32) observes, "the thing, given in satisfaction, must be of " the same nature, and attended with the same certainty, " as the thing, in lieu of which it is given; and land is " not to be taken in satisfaction for money: nor money " for land."

What resemblance has this interest, a share in a powder-work, to a sum of money provided by marriage settlement

(32) 1 *Atk.* 426; where the authorities are collected, and distinguished by Mr. *Sanders*. See also upon the doctrine of satisfaction, ante, *Hinchcliffe v. Hinchcliffe*, *Sparkes v. Cator*, Vol. III, 516, 530. *Tolson v. Collins*, IV, 483. *Trimmer v. Bayne*, VII, 508. *Robinson v. Whitely*, IX, 577, and the notes, I, 112, 259.

settlement as a portion for the children of the children. Whether this child will be entitled to any money, depends entirely upon the computation as to the value of the other interest. There is no instance of satisfaction of a money portion by such an interest as this. It wants both the circumstances, enumerated by Lord *Hardwicke*; consisting in part of good-will of the trade, the stock in hand, leasehold premises, and debts, due to the concern; in all those particulars of a different nature from money. This, as in the case of *Grave v. Lord Salisbury* (33), is a provision not *Ejusdem generis*. This share in the trade also is not a clear interest; but is encumbered with an annuity.

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Mr. *Richards*, Sir *Samuel Romilly*, and Mr. *Bell*,  
for the Defendants.

This provision by Will is a satisfaction or performance of the engagement in the marriage settlement. The father's object was to give a legacy of 10,000*l.* and in the event he does give in cash 9000*l.* to his son. In *Bellasis v. Uthwatt* the thing was perfectly distinct: but this is an interest of the value of 10,000*l.*; which, in whatever shape, though part only money, and the rest a concern of a personal nature, must be a performance of an engagement to pay 2000*l.* A portion is not considered, with reference to this question, as any other debt; the presumption is, that, if the subsequent provision is as considerable as the other, it is a satisfaction; if less, it is a satisfaction in part: the Court leaning against double portions: but upon the circumstances of this case the intention is clear to give this son 10,000*l.* in satisfaction of every demand.

*The*

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*The MASTER of the ROLLS.*

The question in this cause is, whether *Abraham Elton* ever received a satisfaction for the portion of 2000*l.* to which he became entitled under his father's marriage settlement. The Defendants contend, that he has received more by the Will. On the other side it is admitted, that a bequest of 10,000*l.* would be a satisfaction of a portion of 2000*l.*: but it is said, this does not amount to a bequest of 10,000*l.*: it is only a bequest of a share of powder-works; and of such sum of money as should, together with the value of that share, make up to him the full sum of 10,000*l.*; and it is contended for the Plaintiffs, representing him, that a provision, which is not *Ejusdem generis*, can never be a satisfaction for a portion; as land is no satisfaction for money: nor money for land: or, to come nearer to this case, as in *Grave v. Lord Salisbury* (34) it was determined, that the value of a beneficial lease was not a satisfaction *pro tanto* of a legacy.

Land not a satisfaction for money: nor money for land: not being *Ejusdem generis*.

Many other cases might have been cited; which are in some degree analogous to that; as decisions upon the effect of a bequest of the residue of an estate: but it is to be observed, that in none of those cases did the party making the advance, or the bequest, ever make either with reference to a definite amount, to which he intended it should reach. They are all cases, in which the testator, without reference to the pecuniary value of the thing he was giving, has given it; and the question was, whether, as upon entering into a computation of the value of the thing given it turned out equal to the portion, or the legacy, it should be taken as a satisfaction: the testator not having indicated any idea of his own, whether

(34) 1 Bro. C. C. 425.

whether it was, or was not, correspondent in value to the debt, which he owed, or the legacy he gave. Those cases therefore would not precisely apply.

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In the case I have mentioned Lord *Salisbury* does not appear to have entered into any calculation of the value of the lease; or the proportion, it bore to the legacy, which he gave to his son; intending merely to make a provision for him in that particular way. So, in the cases as to a residue: all, that was meant, was to give the residue; not expressing, that it would turn out to be of superior, or equal, or any given, value.

In the case of *Barrett v. Beckford* (35) Lord *Hardwicke* held the bequest of a moiety of the residue for life not to be a satisfaction of an annuity. There was the further distinction, that it was the case of a debt, not a portion. So, in the case of *Devese v. Pontet* (36), where Lord *Kenyon* held a bequest of half of the residue to the testator's wife not a satisfaction, the testator had said nothing of the value, and it was also the case of a debt, not a portion. In the case of *Alleyn v. Alleyn* (37) Lord *Hardwicke* does not, nor did Lord *Kenyon* in the other case, decidedly say, a residue might not under any given circumstances be a satisfaction for a portion; and in *Alleyn v. Alleyn* Lord *Hardwicke* reasoned chiefly upon the one being only for life: the other being an absolute interest; and would not go into the calculation, that perhaps the residue would turn out to be as much as the son might have purchased for his life with the 1500*l.*; if that sum had been paid to him: but in *Richman v. Morgan* (38) Lord *Thurlow* held, that a residue

As to satisfaction of a portion by a residue.

(35) 1 *Ves.* 510.

(37) 2 *Ves.* 37.

(36) *Pre. Ch.* 240. Mr. *Finch's* note. (38) 1 *Bro. C. C.* 63. 2 *Bro. C. C.* 394.



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residue should go in satisfaction of a portion; and thought it absurd, that a residue, worth 100,000*l.*, should not be a satisfaction of a portion of 8000*l.*, merely because only a small proportion of the residue was actual money.

Whether a portion of 2000*l.* would not be satisfied by a bequest of so much of his residuary estate as should be of the value of 2000*l.*, *quare.*

Extrinsic evidence admitted, not to construe a Will, but to shew, with reference to what it was made.

I am by no means clear, that, if this testator had confined himself to saying, he gave so much of his residuary estate as should be of the value of 2000*l.*, that would not have been a satisfaction of the portion of 2000*l.* I have not found any case, precluding such a determination. But that is not the whole; for there is upon the face of the Will a clear pecuniary bequest to some amount. The amount is, indeed, uncertain; depending upon the value of the powder concern: but the testator knowing the value of the share not to be 100,000*l.*, says, he means to give in money, all, that the share shall fall short of such sum. If it does fall short to the amount of 7000*l.*, he meant to give 7000*l.* There is no reason, why I should not inquire the amount of the pecuniary legacy. It is not necessary, that it should appear upon the face of the Will; any more than in the case of a legacy to a son of such sum as the testator had advanced to another child upon marriage. Should I not in that instance inquire the amount? You cannot refer to extrinsic evidence to construe a Will: but you may, to shew, with reference to what the Will was made (39). If I find, that the value of the share of the powder concern was 8000*l.*, then the value of the bequest is 7000*l.*; and can I take the legatee not to have a satisfaction for 2000*l.*?

It is then said, that the provision, made by the Will is clogged with an annuity of 20*l.* to Mrs. *Prout*; and therefore is not taken so beneficially as the portion; which is not subject to any burthen: but, if I see, that the bequest

(39) Ante, Vol. I, 259, and the note, 267.

quest is so large, so far exceeding the portion, that the diminution by the burthen imposed upon it, cannot affect the relative proportion, it would be against common sense to say, that, if a bequest of ten times the amount of the portion is burthened with a charge, not to the extent of a tenth part, the remainder, though greatly exceeding the portion, shall not be a satisfaction. The child will have the portion clear; and in as beneficial a manner as by the articles.

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I lay no stress upon the other provision, which this son had, from his grand-father; and yet it is clear, the father conceived, that this child was amply provided for; assigning that as the reason of the disposition he makes. He must then be taken, when making this provision of 10,000*l.*, to say, "here is an end of all claim by this child upon my estate;" and never could intend that child to claim in diminution of that residue, which he gave to his second son; who was not so provided for; and yet intended to be placed upon an equality with the other. That is evidence of the intention: but the other ground is sufficient for the determination, that this portion is satisfied.

The Bill therefore must be dismissed.

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HIGGINSON v. CLOWES.

July 27th, 28th.

Parol evidence, in aid of a specific performance upon the sale of an estate by auction, to explain by declarations of the auctioneer an ambiguity on the face of the particular, by a general clause for a separate valuation of the timber, and also special provisions as to the timber upon certain lots, the agreement, signed on the back of the particular, binding the purchaser, Defendant,

THE Bill prayed the specific performance of an agreement for the purchase of an estate from the Plaintiffs, devisees in trust. The sale was made by auction, on the 4th of *December*, 1804, in seven lots; all of which, except Lots 3 and 7, were purchased by agents for the Defendant, at the price in the whole of 13,034*l.* 15*s.* The particular, in the description of Lot 1, a freehold estate, called *Gallow Hill*, stated it generally as embellished with stately timber; and in specifying the quantities and qualities of the land stated woodland 5 A. 30 P. Lot 2 was called *Bangor's Farm*, in hand; consisting of a farm-house, &c. garden and orchard well planted with fruit-trees. The description of Lot 4, a freehold messuage and premises, garden and two orchards, situated below *Gallow Hill Wood*, contained the following clause:

"There are six pieces of elm and ash timber on this lot, which the purchaser is to take at a fair valuation."

As to Lot 5, a freehold cottage, &c. gardens and orchard, it was stated, that there were a few timber trees

to a strict fulfilment of this article, and to abide by the conditions and declarations made at the sale," rejected.

Distinction, where evidence is to resist a specific performance.

Though a Defendant to a bill for specific performance of a contract may have a Decree for performance according to his construction, if adopted by the Court, without a Cross-bill, the decision being, not according to his construction, but only that he had contracted under a mistake, created by the Plaintiff, the Bill was merely dismissed.

trees and saplings on this lot to be taken at a valuation. After the usual conditions for a deposit of 20% *per cent.* the purchaser to sign an agreement for payment of the remainder of the money on or before *Lady-day*, that on payment of the remainder the vendor would convey with a good title, &c. and that upon failure of complying with the above conditions the deposit should be forfeited, and the vendor be at liberty to re-sell, &c. The eighth condition of sale was expressed in these terms.

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"The purchaser to pay for the fallows, dressings, half-dressings, dung, soil and compost, on the farm in hand as between farmer going out and farmer coming in; and to take the timber and timber-like trees down to one shilling *per* stick inclusive, at a fair valuation."

The agreement, signed by the Defendant on the back of the particular, after the usual acknowledgment of the purchase, and that the Defendant agrees to pay the remainder of the money and complete his purchase on having good titles executed and conveyed to him, concluded thus :

"I bind myself my heirs executors administrators and assigns to a strict fulfilment of this article and to abide by the conditions and declarations made at this sale."

The Defendant objected to the title of Lots 1 and 4; insisting also, that he was bound to pay for trees in Lots 4 and 5 only; and that only, in case a good title was made; submitting to take the title of Lots 2, 5, and 6; and that, as the lots were sold separately, he is entitled to have a conveyance of such of them as the Plaintiffs

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tiffs can make a title to, and to refuse those, to which they cannot make a title.

The Plaintiffs insisted, first, upon the construction of the conditions, that the clause as to the timber extended to all the lots: secondly, that the auctioneer at the sale, in answer to a question, whether the timber upon each lot was to be taken at a valuation, declared publicly, that the timber on every part of the estate was to be valued separately, and taken by the purchaser of each lot at such valuation. This was proved by the evidence of the auctioneer and his clerk: opposed by that of the agents of the Defendant, that they did not recollect any such conversation.

The timber on Lot 1 was valued at above 2000*l.*: that on Lot 2 at 633*l.* 2*s.*, on Lot 4 at 3*l.* 6*s.*, Lot 5 9*l.* 15*s.* 4*d.* and Lot 6 at 30*l.* 12*s.* 9*d.*

Sir *Samuel Romilly* and Mr. *Heald*, for the Plaintiffs, contended,

1st, That, without resorting to parol evidence, the fair construction of the particular is, that the timber upon all the lots was to be taken upon a separate valuation. The clause, expressing that, as one of the conditions, is not confined to any one particular lot.

2dly, As to the admission of parol evidence, the only cases applicable are *Gunnis v. Erhart* (40) and *Jenkinson v. Pepys* (41). It is certainly true, that evidence cannot be received to add to a written agreement, or to explain
 an

(40) 1 *H. Black.* 289.

VI, 330, *The Marquis of*

(41) In the Court of Ex- *Townshend v. Stangroom.*
 chequer. Cited ante, Vol.

an ambiguity appearing upon the face of it; which rule applies equally to the conditions of sale, when embodied into the agreement: but, separately considered, the case of *Gunnis v. Erhart* is the first decision against the admission of evidence to shew, that the printed conditions had been contradicted at the sale by the auctioneer. The question, stated correctly, is, whether evidence may be admitted, not to contradict the printed conditions, but of explanations made at the time of the sale. Many instances may be put: an alteration in manuscript, or a condition struck out, by the auctioneer: giving notice before the sale by a specific declaration, that he does not sell upon those conditions, as they originally stood? Could not evidence be received, that, the original proposal being, that the money should be paid on the 1st of *May*, the parties had agreed, that the payment should be postponed to the 1st of *August*? In such a case the agreement is not signed upon those conditions; therefore the objection upon the Statute of Frauds (42) does not arise. If a condition could be thus proved to have been varied, or abandoned, why may not a doubt be so explained; as, whether this condition as to the timber applied to one or more particular lots, or to all? If the conditions are expressed in ambiguous terms, the explanation is due to Justice; and by adhering to the strict grammatical construction after such explanation a great inlet to fraud is laid open. In *Drewe v. Warrington* Lord *Alvanley*, a Judge much attached to the Statute, was struck with the mischief. Suppose, a person at the auction, before the sale, made a claim to the estate; and the auctioneer declared, that the purchaser must take subject to that claim: could the purchaser after that explanation resort to the printed conditions.

Mr. *Hart* and Mr. *Bell*, for the Defendant.

Parol evidence cannot be admitted, either to contradict

or

(42) Stat. 29 *Char.* II, c. 3.

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or explain a written agreement, except in the instances of fraud, mistake, or *Ambiguitas latens*; as where two persons have the same name: *Meres v. Ansell* (43). This evidence, extending to all the lots the condition, that the timber was to be taken upon a distinct valuation, equally contradicts the written agreement, specifying the particular lots. An agreement, capable of a fair and reasonable construction, does not require the aid of evidence; and, if it is so uncertain, that nothing can be made of it, it is void. If evidence can be thus admitted by way of explanation, fraud cannot be excluded. Upon these principles all the authorities are uniform against the introduction of evidence to explain a written agreement: *Gunnis v. Erhart* (44). *Brodie v. St. Paul* (45). *Jordan v. Sawkins* (46). *Pym v. Blackburn* (47). *Jenkinson v. Pepys* (48). *Woollam v. Hearn* (49).

The conclusion of this agreement, expressing, that the purchaser binds himself to a strict fulfilment of this article and to abide by the conditions and declarations, made at the sale, cannot raise any distinction. Even if the expression had been "parol declarations," it would have been equally within the Statute. Independent of that act the Court would be very unwilling to let in evidence; from the danger, which must attend the introduction of it in such cases; which is pointed out by Lord *Loughborough*. What is to be understood by the words "declarations at the sale?" Does that expression comprehend the inflated description, usually held out upon these

(43) 3 *Wils.* 275.

(44) 1 *H. Black.* 289.

(45) *Ante*, Vol. I, 346.

(46) 3 *Bro. C. C.* 388.
Ante, Vol. I, 402.

(47) *Ante*, Vol. III, 34.

(48) In the Exchequer.
Cited ante, Vol. VI, 330,
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 528.

(49) *Ante*, Vol. VII, 211.

these occasions; and are such fanciful and extravagant representations to have the effect of a warranty? If any declarations can be admitted, such a condition as this, certainly not usual, should not without a distinct specification, preclude mistake, be referred to any thing except the printed conditions and declarations. This cause is a strong instance of the inconvenience and danger, attending the application of such means to an inquiry of this nature: the Plaintiffs' witnesses being opposed by others; asserting with equal confidence, that such declarations were not made; or at least not so as to draw their attention; and induce them to suppose, that any alteration was intended.

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In this case the written agreement leaves the question as to the timber in so much obscurity, that I wish I were permitted to resort to other evidence to elucidate it: but my opinion is, that I cannot admit the parol evidence for the purpose of explaining this agreement. I have upon other occasions (50) stated my opinion, that sales by auction are within the Statute of Frauds (51): but, whether they are, or not, this is clear; that, if a sale by auction is followed by a written agreement, that cannot be either explained, or added to, by any parol evidence.

July 28th.

The case of *Jenkinson v. Pepys* (52) is an authority, if an authority were required, for that proposition. In that

(50) *Buckmaster v. Harrop*, chequer, cited ante, Vol. VI, ante, Vol. VII, 341; see the note, 345. 330, *The Marquis of Townshend v. Stangroom*. 1 Ves. &

(51) Stat. 29 Ch. II. c. 3. Bea. 528.

(52) In the Court of Ex-

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that case the 2d lot was described as an orchard and nursery, well planted. In the description of the 3d lot no notice was taken of any nursery: but the fact was alleged, that a considerable nursery or plantation of young trees was upon that lot; and there was at the foot of the particular a *Nota Bene*, that the timber and timber-like trees, with the underwood and plantation in the nursery, were to be paid for, down to sixpence *per* stick, inclusive. Sir *Lucas Pepys* became the purchaser of Lot 3, but not of Lot 2. He admitted, that the timber and timber-like trees upon all the lots were to be paid for; but contended, that the underwood and plantation were to be paid for only in the nursery; which must be understood to be that only, which was described, in the 2d lot. Parol evidence was offered, to shew, first, that there was a nursery or plantation in the 3d lot; and, secondly, that the auctioneer had frequently during the auction declared, that he sold nothing but the land; and every thing, that grew upon it, was to be separately valued, down to the value of sixpence *per* stick, inclusive. Other witnesses also stated, that the auctioneer had made that declaration. Witnesses, who were at a greater distance from the auctioneer than Sir *Lucas Pepys* himself, or his agent, swore, that a particular question was put to the auctioneer as to what was comprehended in Lot 3; and the answer was, that nothing was comprehended in it but the land. *Nixon* (the agent) swore, he did not hear this. The evidence was rejected: it being held incompetent to the Court to receive any explanation of the particular, and the conditions, to which the agreement, that was signed, referred.

Though a paper, as the Particular upon a sale by auction, may by reference be engrafted into a contract within the Statute of Frauds, that will not authorise the introduction of parol evidence to shew, what part was read.	In this case the articles, that are signed, refer to the particulars and conditions; which are to be considered therefore
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therefore as ingrafted into the agreement; and whatever question there is upon the import of them is to be decided by construction, not by evidence. The reference to declarations at the sale, supposing it to mean parol declarations, will not vary the case. Conceiving, that sales by auction are within the Statute, the agreement for the sale must be committed to writing; and the case of *Brodie v. St. Paul* (53), which has been approved in subsequent cases, shews, that such a reference will not let in parol evidence. I desire not to be understood as delivering any opinion, whether, supposing these Plaintiffs had been Defendants, the evidence would, or would not, be admissible (54): but my opinion is, that clearly upon the part of a Plaintiff, seeking performance, it cannot be received.

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The question then is, whether I can decree a specific performance according to the construction, put upon this agreement by the Plaintiff. No one, who had read only the printed particular in this case (I mean the particular, as contra-distinguished from the conditions), could entertain the idea, that any other timber was to be separately valued, and paid for, than what was upon the Lots 4 and 5. The very declaration, that the timber upon those lots was to be valued and paid for, implies, almost conclusively, that the timber upon the others was to be included in the lots, and sold with them. That conclusion would be greatly strengthened by the manner, in which the timber upon Lots 1 and 2 is spoken of in the particular; as augmenting the beauty, and of course increasing the value, and the price, to be paid for the lot. Upon the particular I should have thought it clear for the purchaser: but the eighth article of the condition raises a question, of which it does not furnish any satisfactory solution.

(53) Ante, Vol. I, 326. note, ante, Vol. III, 38, 9,

(54) *Clowes v. Higginson*, 40, *Pym v. Blackburn*.

1 *Ves. & Bea.* 524. See the

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solution. If it has the general meaning, which is ascribed to it by the Plaintiff, the declaration, added to Lots 4 and 5, was unnecessary; for upon that supposition, as the provision now stands, the agreement is, that some of the timber shall be valued; and also, that all the timber shall be taken at a valuation: but, that it was unnecessary, is not the worst of that declaration. It had a strong tendency to mislead as to the meaning of the eighth article of the conditions. That is one source of doubt. Another source of doubt is, that this which is contended to be a general provision, is blended in the same sentence with what is admitted to be a particular and restrained provision. The first part applies only to the purchaser of the farm in hand: whereas it is contended, that the second part is to be understood of any purchaser of any lot, upon which timber is growing. It must at least be admitted, that what the Plaintiff contends to be the meaning might in various ways have been much more plainly expressed. The express declaration as to Lots 4 and 5 might have so strongly impressed upon the purchaser the idea, that he was to pay for the timber on those lots only, that, even supposing the general words, afterwards so indistinctly and confusedly introduced, would in strict construction bear, and properly bear, the meaning, put upon them by the Plaintiff, my opinion is, that it would not be equitable to enforce the specific execution of a bargain, so different from that, which the purchaser might reasonably enough conceive himself to have concluded. If the one might intend to sell upon one set of terms, as he conceives them, and the other intend to buy according to a different set of terms (55), there is in reality no agreement between them: at least, none, which ought to be specifically enforced at the suit of that party, through whose inaccuracy, to say no more, the misapprehension arises.

(55) *Calverly v. Williams*, ante, Vol. I, 210.

arises. I cannot therefore decree a specific performance of this agreement according to the Plaintiff's construction: but, upon the other hand, I cannot decree a performance according to the Defendant's construction; unless the Plaintiff chooses to take it in that manner. If he does not, the bill must be dismissed.

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Mr. *Hart*, insisting, that it was not competent to the Plaintiff to elect to dismiss his bill, obtained leave to speak to it again, if he could find cases.

On a subsequent day Mr. *Hart* referred to some cases (56), in which the Court had held, that a Defendant without filing a cross bill might have a specific performance of the agreement; although the Plaintiff might be desirous of having his bill dismissed. But his Honor thought, those cases did not apply; as here he had not decided, that the Defendant's construction was the right one; but only that, having purchased under a mistake, he should not be compelled to performance at the suit of the party, who had given occasion to the mistake by the ambiguous wording of the particular and the conditions.

The bill stood dismissed (57).

(56) *Gwynn v. Lethbridge*, XIII, 425, 546.  
ante, Vol. XIV, 585. *Stapyl-* (57) See *Clowes v. Higgin-*  
*ton v. Scott, Fife v. Clayton*, son, 1 Ves. & Bea. 524.

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ROBINSON v. CLEATOR.

Aug. 3d, 4th.

Trust by Will as to the residue of real and personal estate for a nephew and his heirs, to pay him the interest for life, with power to the trustees, in case they should see it would be for his benefit to advance him, when it may be in their power, any part of the principal for his advancement in life, that they will not withhold

such assistance as they may deem necessary: but, in case no part should be advanced, the residue to be divided among the nephew's

issue; with a limitation over, if he should leave no issue.

The nephew is entitled, not to the absolute property, but for life only; and, no advancement having been made, an Inquiry was directed, whether his circumstances required advancement.

**M**MARGARET ATKINSON by her Will directed, that all the residue of her real and personal estate should remain in trust for her nephew and god-son *George Rowland Nicholson* and his heirs; and that her trustees should pay to him half-yearly the interest, dividends and annual proceeds, thereof, for and during the term of his natural life. She then proceeded thus:

"At the same time I vest a power in my trustees that in case they should see it would be for his benefit to advance him when they may have it in their power any part of the principal of such residue for his advancement in life that they will not withhold from my said nephew such assistance as they may deem necessary: but in case no part should be advanced then I direct that my said nephew leaving lawful issue that the said residue shall be divided share and share alike amongst such issue as he may have: but in case my said nephew should die leaving no lawful issue then I direct the same to remain in trust in like manner for the benefit of his two brothers."

The question, upon a bill filed by the executors, was, what estate and interest the nephew of the testatrix took under the Will in the residue of the real and personal estates.

Mr. Hart and Mr. Kenrick, for the Defendant *George Rowland Nicholson*, the nephew, contended, that he took

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an absolute interest; that the whole was to be considered as given to him; unless some good reason could be assigned to the contrary. They cited *Osborn v. Brown* (58).

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Mr. *Richards*, for the other Defendants, insisted, that *George Rowland Nicholson* took only for his life; with the exception of what, if any thing, the trustees in the exercise of the direction, confided to them, should think proper to give for his advancement in life.

The MASTER of the ROLLS at the close of the argument said, the executors might in the exercise of a sound discretion give the property to the nephew: but it was impossible for the Court to say, it was absolute property in him. The discretion of the executors is a direct negative of that.

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*The MASTER of the ROLLS.*

I have found a note of a case, more applicable to this than any, that have been referred to; and I have no objection to make such an Order, as was there made by Lord *Thurlow*. That case is *Lewis v. Lewis* (59). *Thomas Lewis* by his Will gave to two persons a sum of above 3000*l.*, upon trust to apply the dividends and interest to apply the dividends to the maintenance of *A*, until twenty-

Aug. 4th,  
Bequest of 3000*l.* on trust

(58) Ante, Vol. V, 527.      nuary, 1785, Register Book, the maintenance of *A*,  
(59) In Chancery, 21st January, 1784, fol. 89.      until twenty-

one, and afterwards to pay the whole dividends to him for life, with power to the trustees before his age of twenty-six to raise and pay, not exceeding 600*l.*, towards or in order to his preferment or advancement in life or his other occasions as they should think proper.

Upon a claim of the whole at the age of twenty-one, as absolute property, Inquiry directed as to his circumstances, and whether they required the advancement of any and what part before he should attain twenty-six.

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interest to the maintenance of the Plaintiff until his age of twenty-one; and afterwards to pay the whole of the dividends, &c. to him for life; and authorized and empowered the trustees at any time, before the Plaintiff should attain the age of twenty-six, to raise any sum, not exceeding 600*l.*; and to pay, apply, and dispose of, the same towards or in order to the preferment or advancement in life of the Plaintiff or his other occasions as they should think proper.

After a Decree, directing the accounts, the Plaintiff, having attained the age of twenty-one, petitioned for payment of the 600*l.*, as an absolute bequest to him: but Lord *Thurlow* directed an inquiry, what were the circumstances and situation of the Petitioner; and whether they required the advancement of any and what part of the 600*l.*, before he should attain the age of twenty-six; and the Master was ordered to state his opinion thereon to the Court.

I have no objection to that Order; which is a confirmation of the opinion I expressed, that this cannot be considered as absolute property, even under the larger words, "or other occasions (60)."

(60) *Keates v. Burton*, ante, Vol. XIV, 434.

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1808.

June 2*d.*

Aug. 5*th.*

BROWNE v. RABAN.

Under an agreement for a lease "with usual covenants" the lessor is not entitled to a covenant against assigning or under-letting without licence.

BY an agreement in writing, dated the 6*th* of *March*, 1798, and signed by the Plaintiff and the Defendant, it was declared, that the Plaintiff should hold and enjoy a messuage

messuage and premises, in *New Bridge Street, Black Friars*, except one room, then used by the Defendant, as the office belonging to the Sea Coal Company; to hold the same for the full end and term of fourteen or twenty-one years at the entire option of the Plaintiff from *Lady-Day* next at the yearly rent of 90*l.* free from all taxes; and that the Plaintiff should lay out the sum of 100*l.* in good and substantial repairs, and keep the same in repair during the said term: the Plaintiff to be permitted to take down the partition, dividing the stairs and the office, and to erect another partition in the room thereof at his own expence; "and to execute a counter-part of a lease with usual covenants at the mutual expence of both parties as soon as the repairs are completed."

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The Plaintiff entered; and laid out considerably more than 100*l.*; and occupied the premises until the year 1805; when, proposing to retire into the country, with the view of performing a contract he had entered into to let the house he applied to the Defendant to execute a lease according to his agreement. The Defendant insisting upon the insertion of a covenant against assigning or under-letting without consent, as a usual covenant, the Bill was filed, praying a specific performance and injunction.

Mr. *Richards* and Mr. *Owen*, for the Plaintiff, relied on the opinion lately expressed by the *Master of the Rolls* upon this point (61), corresponding with that of Lord *Thurlow* in *Henderson v. Hay* (62); insisting, that this covenant cannot be represented as usual; though it may be reasonable: but, so considered, it must be the subject of special stipulation; that the decisions for inserting this

covenant,

(61) *Vere v. Loveden, Jones* (62) 3 Bro. C. C. 632.
v. Jones, ante, Vol. XII, 179, s
186.

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covenant, as usual, were in the instance of a public-house: but there are many leases in *London* without such a covenant; and it was never held, that it ought to be inserted in the lease of a farm, unless contracted for.

Sir *Samuel Romilly* and Mr. *Hall*, for the Defendant, contended upon the cases *Morgan v. Slaughter* (63), and *Folkingham v. Croft* (64), that this covenant, which they said is now familiar in *London*, should be inserted, generally, as a fair and usual covenant; observing, that the *Master of the Rolls* had not decided the question.

*The MASTER of the ROLLS.*

The general question must be decided in this case; as there are no particular circumstances. Though executors and assigns are not mentioned, whatever interest the Plaintiff took he could assign, unless prevented by this covenant.

*The MASTER of the ROLLS.*

Aug. 5th.

The only question in this case is, whether under an agreement for usual covenants a covenant against assigning without licence is to be inserted. There are conflicting authorities upon that point. If it was to be decided for the first time, I should be disposed to agree with the opinion of Lord *Thurlow*, in the case of *Henderson v. Hay* (65), that the construction ought to be such covenants as are incidental to the lease: but, Lord *Kenyon* having expressed his dissent from that opinion (66), and the  
 Court

(63) 1 *Esp. Ni. Pri. Cas.* 8.

(64) 1 *Anstr.* 700.

(65) 3 *Bro. C. C.* 632.

(66) *Morgan v. Slaughter*,

1 *Esp. Ni. Pri. Cas.* 8.

Court of Exchequer having upon full consideration over-ruled it, I rather think, the understanding of the profession now is, that this is a usual covenant; and is to be inserted, where there is agreement for common and usual covenants. The case of *Henderson v. Hay* appears by the *Register's* Book to have been ultimately compromised: a petition of re-hearing having been presented by the Defendant; and the Bill being afterwards by agreement dismissed without costs (67).

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After this opinion was delivered, the case of *Church v. Brown* (68) then depending before the *Lord Chancellor*, (who had expressed a strong opinion in favor of that of Lord *Thurlow* in *Henderson v. Hay*, and of the *Master of the Rolls* in *Vere v. Loveden* (69), and *Jones v. Jones* (70),) was decided after a communication between his Lordship and the *Master of the Rolls*; upon which it was agreed, that the Plaintiff in this cause should take a lease without the covenant.

(67) See ante, 271.

(69) Ante, Vol. XII, 179.

(68) Ante, 258.

(70) Ante, Vol. XII, 186.

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1808.

## ANDERSON v. DAWSON.

Dec. 1st, 6th.

Settlement by a *fême sole*, in contemplation of marriage, of part of her fortune in trust to pay the dividends to herself for her separate use for life, and after her death for her intended husband; and after the death of the survivor to transfer the capital according to her appointment by Will; and in case she should die without appointment, and he should be then dead, in trust for her next of kin, their executors, &c. according to the Statute of Distributions.

An interest for

life only in the widow, with a power of disposition by Will.

**BY** indentures of settlement, dated the 5th of February, 1789, previous to the marriage of *Sophia Hales* and *Thomas Brown*, *Sophia Hales* covenanted, that in consideration of the intended marriage she would immediately transfer 1000*l.* 5 *per cent.* Annuities to *Elizabeth Hales* and *William Dawson*, their executors, &c. upon trust for *Sophia Hales* until the marriage; and after the solemnization thereof in trust to transfer 400*l.* part thereof, to *Thomas Brown* for his own use; and to receive and take the dividends of the 600*l.* stock, remainder of the said 1000*l.* stock, during the life of *Sophia Hales*, and pay the same to her and her assigns notwithstanding her coverture for her sole and separate use during her life; and after her death upon trust for the said *Thomas Brown*; and after the death of the survivor of *Sophia Hales* and *Thomas Brown* upon trust to transfer and pay the said 600*l.* capital stock, and all the dividends, &c. to such person and persons, and at such time and times, and in such shares and proportions, as *Sophia Hales* should notwithstanding her coverture, and whether covert or not, in and by her last Will and Testament in writing, or by a writing in the nature of her Will, to be signed by her and executed as therein mentioned, direct or appoint; and in case she should die without having so appointed the same or the whole thereof, and *Thomas Brown* should be then dead, then in trust for the next of kin of *Sophia Hales*, their executors, administrators and assigns, according to the Statute for the distribution of the effects of persons dying intestate.

The

The settlement contained a power to the trustees to sell the stock, and lay out the produce of the sale in any other securities, public or private; so as the same should be settled again with the interest thereof upon the same trusts; and a power was given to *Sophia Hales* in case of the death of either or both the said trustees to appoint a new trustee or trustees.

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The stock was transferred accordingly; and the marriage took place. During the life of *Thomas Brown* the trustees paid the dividends of the 600*l.* stock to *Sophia Brown* for her separate use. *Thomas Brown* died in 1802; his widow married *John Houston Anderson*; and, no settlement having been made on that marriage, the trustees continued to pay the dividends to her separate use. In 1806 *Anderson* died. In July, 1807, upon the application of the widow, *Dawson*, the surviving trustee, under the power in the settlement sold 250*l.*, part of the 600*l.* stock; and lent her the money, produced by the sale, upon her procuring an assurance to him of the amount after her death; and by indentures, dated the 30th of July, 1807, the remaining 350*l.* stock was vested in *William Dawson* the elder, and *William Dawson* the younger, who was substituted as a trustee in the room of *Elizabeth Hales*, upon the trusts of the original settlement.

The bill was filed by Mrs. *Anderson*, being still a widow; praying a declaration, that in the events, which have happened, the sum of 350*l.* stock is no longer bound by the trusts of the settlement; or that the Plaintiff under the trusts thereof is absolutely entitled to the stock, and to dispose thereof in her life-time, as she shall think proper; and that the Defendants may be decreed to transfer to her, &c.

The

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The answer stated, that the Plaintiff has three sons by her first marriage, living.

Mr. *Edwards*, for the Plaintiff.

The question is, whether it is competent to the Plaintiff to dispose of the capital of this fund during her life. From the occasion and object of this settlement the intention is clear to guard a certain proportion of the property from the marital right. The question has generally arisen upon a Will: the property, made the subject of such a limitation, has usually been derived from a third person; and the power restrained; as in *Reid v. Shergold* (71) and *Bradly v. Westcott* (72): but in this instance the fund, originally the property of the Plaintiff herself, not derived from the bounty of another, is settled in this way by a deed, to which she was a party; and the intention to tie it up for ever, as against herself, cannot be imputed to her. This is distinguished from *Sockett v. Wray* (73); which was also upon a deed: first, that was not the case of a *feme sole*; and it was held, that, being covert, she could not bind her executors; secondly, the subject of the settlement was not previously the property of the wife. The question is, what was the intention of the Plaintiff at the execution of this instrument; and her object must have been merely to guard against claims under the right, which her husband would acquire: not to make her next of kin at the time of her death, perhaps remote relations, purchasers of this property. Therefore, though the terms of this deed strictly confine her power to a testamentary disposition, she is now entitled to the absolute dominion over the property; and may call upon the trustees accordingly.

Mr.

(71) Ante, Vol. X, 370.

(73) 4 Bro. C. C. 483.

(72) Ante, Vol. XIII, 445.

Mr. *Hall*, for the Trustees, Defendants.

By this settlement the husband taking 400*l.* of his wife's fortune, and 600*l.* being settled in this way, can it be represented, that all this care about the disposition has no meaning? She has the power to dispose by a revocable instrument only; and it is clear, that a limitation for life, with a power to appoint by Will, and in default of appointment a remainder over, gives, not absolute property, but a mere interest for life, with a power; and, unless the power is executed, the limitation over will take effect. The case of *Sockett v. Wray* is directly applicable; but stronger: the limitation in default of appointment being, not as in this settlement to the next of kin, but to the executors or administrators. The construction of the very same words cannot depend upon the distinction, that the subject was or was not originally the property of the party, in whose favour it is thus limited. The meaning and effect must in both instances be the same; though perhaps some difference may arise from the character of the person, calling for the fund, whether a *feme covert* or *sole*. The appointment would be ingrafted on the original instrument; and the object would take under that. May not this Plaintiff hereafter make a Will? If she should not, her next of kin claiming would claim under the words of the settlement. If the only object was to guard against the marital right, why should the protection extend beyond her husband's death? Suppose, the description, instead of "next of kin" had been "children." The conclusion is, that the husband stipulated for the children, who might be her next of kin.

Mr. *Edwards*, in Reply, observed, that the limitation in default of appointment in *Sockett v. Wray* was to the executors for their own use and benefit; under which words

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words it might be contended, that they would have been purchasers, and have had a vested interest, as much as the next of kin under this settlement: but the Court would go far beyond the intention by giving a vested interest under either description to persons, who are perfectly contingent. It is impossible to say, who may be the next of kin. The question is, whether there is a vested interest in any one under these words.

The MASTER of the ROLLS.

There was a case (74) before Lord *Alvanley* upon a settlement in favor of next of kin, whether they could take a vested interest. It turns upon that; whether they were intended: so that the Plaintiff could disappoint them only by a Will. It cannot be contended, that the next of kin at the execution of the settlement are entitled: they are uncertain persons; to be ascertained at the time of her death.

The MASTER of the ROLLS.

Dec. 8th.

This Bill can be supported only upon the assumption, that the Plaintiff has the absolute property in the fund; and is not merely entitled for life, with a power of disposition by Will. In order to make that out, it must be shewn, that the ultimate limitation, to her next of kin, is either wholly inoperative; or is in effect a limitation,

Distinction between a limitation to the executors and administrators and to the next

to herself: but there is a great difference between a limitation to the executors and administrators and a limitation

(74) *Griffin v. Nunson*, ante, Vol. IV, 344.

of kin: as between a limitation to the right heirs, and to heirs of a particular description as to real estate; giving the ancestor, having a particular estate, the whole property in the former case; not in the latter.

The description "next of kin" means at the death.

tation to the next of kin. The former is as to personal property the same as a limitation to the right heirs as to real estate: but a limitation to the next of kin is like a limitation to heirs of a particular description; which would not give the ancestor, having a particular estate, the whole property in the land. The meaning of "next of kin" of the Plaintiff must be those, who answer that description at the time of her death; who may be very different persons from her administrators. She is now a widow. If she marries again, and dies during the life of her husband, he would be the administrator at Law; and in that character, if the property was absolutely her's, he would be entitled: whereas the common course to exclude the marital right of the husband, as administrator, is by a limitation to the next of kin of the wife. In the case of *Watt v. Watt* (75) it was expressly decided, that no doubt could be entertained, that such a limitation excludes the marital right. In *Griffin v. Nanson* (76), to which I alluded, the question came on in rather a different shape. *Fielder* had executed a deed; by which he assigned all his property to trustees; upon trust to pay the interest to himself for life, and, after his decease, to such persons as he should appoint by Will, for their lives; and subject thereto, to pay the principal to his next of kin, living at his decease, his, her, or their, executors. By his Will he gave absolute legacies to two servants, upon condition of relinquishing all claims and demands against his estate; and gave all the residue to his two half-sisters; who were his next of kin at the time of execution of the deed, and at his death. One of the executors proved, that this arrangement, which was substituted for a former intention to give the interest of all the property to the two servants and the survivor for their lives, and the principal after

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The marital right of the husband, as administrator by law, excluded by a limitation to the next of kin of the wife.

(75) Ante, Vol. III, 244.

(76) Ante, Vol. IV, 344.

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after their deaths to the next of kin; was made with the concurrence of one of the next of kin. There was some ground for supposing, though it was not in evidence, that the other next of kin had also approved it. The case, upon the Bill of the next of kin, claiming the residue, and to set aside the legacies, as not warranted by the power, was argued at great length; and ended in a compromise: but it is quite evident from what passed, that Lord *Alvanley* thought, the legatees would have great difficulty in sustaining their claim upon any other ground than that the testator had executed his power substantially; or, if not, that the acquiescence of the next of kin, and their approbation, amounted to a dispensation with the formal execution: whereas, if the limitation to the next of kin left him the absolute owner of that property, there would have been no difficulty in the question: he might by his Will have given it, as he thought fit.

In the argument of this case it was said, that in *Socket v. Wray* (77) the *Master of the Rolls* seems to admit, that the wife, if she should become *sole*, would have the right to dispose, as she thought fit: but the limitation was, not to her next of kin, but to her executors or administrators; and the question did not turn upon the *quantum* of interest given by that limitation: but the objection was, that, be it what it might, she could not, while a *fême covert*, make any disposition, except in the precise mode appointed by the settlement. If the intention was, that this lady, surviving her first husband, should have the absolute property, the provision should have been, that in that event the trustees should transfer to, or hold in trust for, her and her assigns; but, as the deed is framed, (and I have no authority nor any ground, to alter or correct it) she is merely entitled for life, with a  
 power

power of disposition by Will; and I cannot decree, that the trustees shall transfer to her, or according to her direction.

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The Bill must therefore be dismissed (78).

(78) See the note, ante, Vol. II, 594, *Standen v. Standen*.

RHODES, }  
THOMAS, } *Ex parte*.  
CASTLE, }

1809.

Feb. 10th.

THE Petition of *Rhodes* stated, that on the 19th of November, 1789, a Commission of Bankruptcy issued against the petitioner, by the name and addition of *William Rhodes*, of *Lawrence Lane, London* (Co-partner with *Thomas Rhodes*, late of the same place, but then of *Charles Town, North America*) warehousemen. The usual proceedings took place under that Commission: assignees were chosen; and the petitioner passed his examination; but had not obtained his certificate. The petition farther stated, that upon the 8th of *October* last another

Costs ordered to be paid, but not taxed until after the Bankruptcy of the person to receive them, cannot be set-off by the party, from whom they were due, proving a debt under the Commission.

Solicitor's lien in bankruptcy, as in a cause, upon the debt and costs: viz. the clear result of the equity between the parties.

Distinction between the practice of the Courts of Law: the Common Pleas upon the same principle not allowing the lien to interfere with a right of set-off, &c.: the King's Bench holding the lien paramount any claim of the party.

Though a second Commission against a Bankrupt, uncertificated under a former Commission, is bad in law, whether the Lord Chancellor will, at the instance of the Bankrupt, supersede the latter, if the assignees under the former will not interfere with the property, *Quære*. Notice to them directed.

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 RHODES,  
*Ex parte.*  
 THOMAS,  
*Ex parte.*  
 CASTLE,  
*Ex parte.*

another Commission of Bankruptcy issued against the petitioner, by the description of *William Rhodes*, of *Shacklewell*, in the county of *Middlesex*, warehouseman, on the petition of *Evan Thomas*; who had full notice of the former commission; of which the petitioner also gave notice to the Commissioners: but the petitioner was declared a bankrupt under the second Commission. The petition, stating, that he had not committed any act of bankruptcy, since the debt of *Thomas* was contracted, nor since the commencement of their dealings, prayed, that the latter Commission may be superseded.

The petition of *Thomas* stated, that in *February* last the petitioner took out a Commission of Bankruptcy against *Rhodes*; which was upon petition to the *Lord Chancellor* superseded in *August* at the expence of the petitioner; the Order directing the costs to be taxed, and paid to *Rhodes*.

The petitioner took out another Commission against *Rhodes* in *October*; and was chosen assignee. The prayer of this petition was, that the bankrupt, or his solicitor, may be restrained from proceeding for the costs of the Commission, that was superseded; and that the petitioner may be allowed to set off such costs against his debt of 340*l.*, proved under the second Commission.

The third petition was presented by *Castle*, the solicitor, employed by the bankrupt in superseding the Commission of *February*; praying, that *Thomas* may be restrained from paying 67*l.* 6*s.* 3*d.* the taxed costs, to the bankrupt; and that he may be ordered to pay the same to the petitioner: suggesting, that, if paid to the bankrupt, it may go into his estate among his creditors; and the petitioner would lose his fees and disbursements.

Sir

Sir *Samuel Romilly* and Mr. *Johnson*, in support of the Petition of the Bankrupt. Mr. *Richards*, for the Assignee.

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RHODES,  
*Ex parte.*

THOMAS,  
*Ex parte.*

CASTLE,  
*Ex parte.*

*The Lord CHANCELLOR.*

Upon the petition of the assignee under the last Commission it is clear, that he is not entitled to the relief he prays; to be at liberty to deduct from the debt, which he has proved, the taxed costs of a former Commission, sued out by him improperly; which was ordered to be superseded at the expence of the petitioning creditor. That Order was made, before the new Commission issued: but the costs were not taxed, and consequently there was no liquidation of the debt, previous to the bankruptcy. The costs therefore, not being a debt, until taxed, became a debt, due to the bankrupt, after the Commission issued; which cannot possibly be set off against a debt, due from the bankrupt before his bankruptcy. That petition must therefore be dismissed.

This relieves me from another difficulty, as to the claim of the solicitor; who seeks to establish a lien upon the taxed costs, ordered to be paid to the bankrupt by the petitioning creditor; whose claim of set-off would have introduced a question, whether, if it should be established, that right would interfere with the solicitor's lien upon the debt recovered; which undoubtedly prevails in general cases. The Court of King's Bench hold their former doctrine, that the Equity of set-off shall not interfere with the lien: the Court of Common Pleas on the contrary hold, that the attorney can have no lien, that will interfere with the equity between the parties (79); and my opinion is, that the practice of this Court \* does not interpose the lien farther than upon the clear balance, which is the result of the equity between the parties.

[ \* 542 ]

(79) *Ante*, 75, 79, *Taylor v. Popham*, and the note.

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 THOMAS,  
*Ex parte.*  
 CASTLE,  
*Ex parte.*

parties. That is proved by the whole form of our proceedings. If this is the true doctrine in causes, and it is clear, that the solicitor in a cause has of course a clear lien upon the debt, and the costs, which are ordered to be paid to the solicitor, why should not the solicitor in bankruptcy have a similar lien? The mere form, that they are ordered to be paid to the party, should not interfere with it (80). The consequence is, that this solicitor must be paid out of the sum of costs, ordered to be paid to the bankrupt; the residue of which must be paid to the assignee; if this Commission is to stand.

Upon that point the objection to the act of bankruptcy must be the subject of an action. As to the other ground for superseding the Commission, I can do no more than direct notice to be given to the assignees under the former Commission; and that they shall inform me, whether they mean to claim the effects, or not; as, if they do, this Commission must be superseded (81).

Sir Samuel Romilly, for the bankrupt, observed, that notwithstanding the case of *Troughton v. Gitley* (82) it was never decided, where there was a first Commission, and after a distance of time, no certificate having been obtained, a second Commission issued, that, merely as the assignees under the first did not claim the property, therefore the second should stand; and it is extremely important to the bankrupt to be the object of two concurrent Commissions; for instance, with reference to the certificate.

*The*

(80) *Ex parte Bryant*, 1 Madd. 49. *Beames on Costs*, 331, 2. (81) *Ex parte Irvine*, 1 Madd. 74. (82) *Amb.* 630. See *Ex parte Martin*, ante, 114.

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The difficulty is this. The first Commission subsisting, of whatever date, the second is clearly bad. Cases have however occurred, where, an old Commission subsisting, and the bankrupt having gone again into trade, a new Commission issued; which he attempted to supersede: and it was held, that, if the persons, claiming beneficially under the old Commission, did not mean to interfere with the effects under the latter Commission, the Court would not interpose: yet then this difficulty remained; that the first Commission might be set up as a bar to an action under the second. The Court however has refused to interfere in that case; and has in Lord *Hardwicke's* time frequently permitted two Commissions to proceed together: a separate, after a joint, Commission: yet it is clear in Law, that the separate Commission was bad. Many important observations arise against what the Court did in the case of *Troughton v. Gitley* (83).

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*Ex parte.*  
CASTLE,  
*Ex parte.*

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Upon this point the Petition of the Bankrupt stood over; that precedents might be searched.

(83) See ante, *Ex parte Brown*, Vol. II, 67; and the *Martin*, 114. *Ex parte* note, 69.

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Nov. 8th.

1809.

Feb. 6th, 7th.

## BURRELL v. CRUTCHLEY.

Devise in strict settlement, with power to the tenants for life to jointure, on condition that two-thirds of the portion should upon such marriage be settled: one-third upon the eldest son of the marriage and one other third upon the younger children.

Upon the intention, that the settlement should be conformable to the limitations of the real estate a trust for the father for life was established: and the interest of the eldest son was not to be de-

vested except

by his death under twenty-one without issue male.

**JEREMIAH CRUTCHLEY** by his Will, dated the 6th of June, 1803, devised all his real estate with some exceptions to the use of *George Henry Duffield* for life, without impeachment of waste; with remainder to a trustee and his heirs during the life of *George Henry Duffield*, to preserve contingent remainders: remainder to the first and other sons of *George Henry Duffield* successively in tail male: remainder to *Thomas Duffield* for life; with similar remainders to preserve contingent remainders, and to his first and other sons in tail male, and remainders over: and the testator directed, that it should be lawful for his nephews *George Henry* and *Thomas Duffield*, when they should respectively be in the actual possession, by deed, with two or more witnesses, to limit and appoint any annual sum or yearly rent-charge not exceeding 100*l.* for every 1000*l.* of the portion or portions of any woman or women, with whom he or they should respectively intermarry, to any such woman or women for life, as a jointure, to be issuing out of, or charged upon, the said premises; and he declared, that the said power of limiting a jointure was given upon this express condition; that not less than two-third parts of the portion, &c. should upon such marriage be settled in manner following: that is to say: "one-third part " upon the eldest son of the marriage and one other " third part upon the younger children;" provided there should not be more than one such jointure charged upon and payable out of the premises at one and the same time.

The

The Will contained a power to the testator's said nephews, when in possession of the said hereditaments, &c. by any deed or deeds, to be executed as aforesaid, to charge all or any part thereof with any sum or sums of money, not exceeding 5000*l.* as portions for the younger child or children of each of his said nephews; and to create and limit such term or terms of years of and in the said hereditaments for better securing the payment of such sum, &c. as should be thought advisable.

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The testator died in 1805; and his nephew *George Henry Duffield* according to a direction in the Will took the name of *Crutchley*.

By indentures of settlement, dated the 14th of *April*, 1806, previous to the marriage of *George Henry Crutchley* and *Juliana Burrell*, reciting the Will, and the funds, composing the portion, amounting in the whole to 13,690*l.* 10*s.* 1*d.*; and that *George Henry Crutchley* had agreed to secure as a jointure the annual sum of 1350*l.*, being less than 100*l.* *per annum* for every 1000*l.* of the portion; and that it was also agreed, that he should charge 5000*l.* on the said devised estates in favor of the younger children of the marriage; and that 15,148*l.* 11*s.* 1*d.* Bank 3 *per cent.* Consolidated Annuities, being equal in value to 9127*l.* 0*s.* 1*d.* which was two-third parts of the portion of the said *Juliana*, should be settled, as therein mentioned: viz. 7574*l.* 5*s.* 6½*d.* Bank Annuities, being equal in value to 4563*l.* 10*s.* 0½*d.* money, which was one-third of the portion, should be settled on the eldest son of said intended marriage; and the like sum, being equal in value to another third of said portion, should be settled, on the younger children; making a provision for them, with the said sum of 5000*l.*, of 9563*l.* 10*s.* 0½*d.* in the whole; and it was farther agreed, that *George Henry Crutchley* should have for his own



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use the remaining third of said portion; it was witnessed, that *George Henry Crutchley* did appoint to the said *Juliana* the yearly sum of 1350*l.*, in full for her jointure, &c.; and a term of one hundred years was created for securing the same; with remainder, and in case that term did not arise, after the decease of *George Henry Crutchley*, to other trustees for the term of three hundred years; upon trust, that in case there should be an eldest or only son and any other child or children, a son or sons, daughter or daughters, or both, or in case there should be no son or sons, or being such all of them should die, before any one of them attained the age of twenty-one years, and there should be one or more daughter or daughters, then and in such case that the trustees should after the decease of the said *George Henry Crutchley* or in his life-time, if he should so direct by deed or writing, &c. by mortgage, sale or other disposition, of the said hereditaments or any part thereof, or by the rents and profits thereof, but without prejudice to the raising and paying the said jointure, levy and raise the sum of 5000*l.* for the portion or portions of all and every such child and children other than and besides an eldest or only son; and pay and apply the same in manner thereafter directed: and it was declared, that the trustees should be possessed of the Bank Annuities in trust after the marriage as to 15,148*l.* 11*s.* 1*d.* Bank Annuities to permit *George Henry Crutchley* to receive the dividends for life; and after his death, in case there should be an eldest or only son, then as to one moiety of the said 15,148*l.* 11*s.* 1*d.* Bank Annuities, being one-third part in value of the portion, upon trust to transfer the said moiety unto such eldest or only son at his age of twenty-one years, the same to become a vested interest in such son at his age of twenty-one years, but not to be transferred to him till after the death of *George Henry Crutchley*, unless he should in his life-time other-

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wise direct; and in case there should not be a son, who should attain the age of twenty-one, then as to said moiety of said 15,148*l.* 11*s.* 1*d.* Bank Annuities upon trust for *George Henry Crutchley*, his executors, &c.; and in case there should be an eldest or only son, and any other child or children, or in case there should be no son, or all the sons should die under twenty-one, and there should be one or more daughters, then as to the remaining moiety of the said 15,148*l.* 11*s.* 1*d.* Bank Annuities, being one other third part in value of the portion, in trust for all and every such child or children other than and except an eldest or only son, as therein-after mentioned; and it was declared, that the trustees should respectively pay and transfer the said 5000*l.* therein before directed to be raised, and also the moiety of the said Bank Annuities unto all and every the child or children other than and except an eldest or only son, equally between or amongst them share and share alike; and if there should be but one, to such only child; to be paid at twenty-one or marriage; to be vested interests in sons attaining twenty-one, or daughters, attaining that age, or married, in the life of *George Henry Crutchley*, notwithstanding death in his life; with a proviso, in the event of death under twenty-one, or, if a daughter, before marriage, or if a son should under that age become an eldest or only son, and as such entitled to the first estate of inheritance in remainder under the Will, the portion of such daughter or son should go to the survivors or survivor of the same children, for whom the said 5000*l.* and moiety of the said Bank Annuities were thereby intended: to be vested and transferrable as the original shares, or as near thereto as circumstances would permit; and that such benefit of survivorship should extend as well to the surviving or accotring, as to the original, shares; and upon farther trust after the death of *George Henry Crutchley*, until said first mentioned moiety of said

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use the remaining third of said portion; it was witnessed, that *George Henry Crutchley* did appoint to the said *Juliana* the yearly sum of 1850*l.*, in full for her jointure, &c.; and a term of one hundred years was created for securing the same; with remainder, and in case that term did not arise, after the decease of *George Henry Crutchley*, to other trustees for the term of three hundred years; upon trust, that in case there should be an eldest or only son and any other child or children, a son or sons, daughter or daughters, or both, or in case there should be no son or sons, or being such all of them should die, before any one of them attained the age of twenty-one years, and there should be one or more daughter or daughters, then and in such case that the trustees should after the decease of the said *George Henry Crutchley* or in his life-time, if he should so direct by deed or writing, &c. by mortgage, sale or other disposition, of the said hereditaments or any part thereof, or by the rents and profits thereof, but without prejudice to the raising and paying the said jointure, levy and raise the sum of 5000*l.* for the portion or portions of all and every such child and children other than and besides an eldest or only son; and pay and apply the same in manner thereinafter directed: and it was declared, that the trustees should be possessed of the Bank Annuities in trust after the marriage as to 15,148*l.* 11*s.* 1*d.* Bank Annuities to permit *George Henry Crutchley* to receive the dividends for life; and after his death, in case there should be an eldest or only son, then as to one moiety of the said 15,148*l.* 11*s.* 1*d.* Bank Annuities, being one-third part in value of the portion, upon trust to transfer the said moiety unto such eldest or only son at his age of twenty-one years, the same to become a vested interest in such son at his age of twenty-one years, but not to be transferred to him till after the death of *George Henry Crutchley*, unless he should in his life-time otherwise

wise direct; and in case there should not be a son, who should attain the age of twenty-one, then as to said moiety of said 15,148*l.* 11*s.* 1*d.* Bank Annuities upon trust for *George Henry Crutchley*, his executors, &c.; and in case there should be an eldest or only son, and any other child or children, or in case there should be no son, or all the sons should die under twenty-one, and there should be one or more daughters, then as to the remaining moiety of the said 15,148*l.* 11*s.* 1*d.* Bank Annuities, being one other third part in value of the portion, in trust for all and every such child or children other than and except an eldest or only son, as therein after mentioned; and it was declared, that the trustees should respectively pay and transfer the said 5000*l.* therein before directed to be raised, and also the moiety of the said Bank Annuities unto all and every the child or children other than and except an eldest or only son, equally between or amongst them share and share alike; and if there should be but one, to such only child; to be paid at twenty-one or marriage; to be vested interests in sons attaining twenty-one, or daughters, attaining that age, or married, in the life of *George Henry Crutchley*, notwithstanding death in his life; with a proviso, in the event of death under twenty-one, or, if a daughter, before marriage, or if a son should under that age become an eldest or only son, and as such entitled to the first estate of inheritance in remainder under the Will, the portion of such daughter or son should go to the survivors or survivor of the same children, for whom the said 5000*l.* and moiety of the said Bank Annuities were thereby intended: to be vested and transferrable as the original shares, or as near thereto as circumstances would permit; and that such benefit of survivorship should extend as well to the surviving or accruing, as to the original, shares; and upon farther trust after the death of *George Henry Crutchley*, until said first mentioned moiety of said

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15,148*l.* 11*s.* 1*d.* Bank Annuities should become transferable to an eldest son, as aforesaid, and until the second mentioned moiety should also become payable or transferable to a daughter, &c. to pay the dividends, &c. for maintenance, &c.; with power to the trustees, with consent of *George Henry Crutchley* and his wife, or, after their deaths at the discretion of the trustees, to apply a third of the presumptive share of any son for his advancement in the world; and, if there should be no daughter or younger son, who should live to acquire a vested interest in the said second mentioned moiety of said 15,148*l.* 11*s.* 1*d.* Bank Annuities, in trust immediately after the death of *Crutchley* or his wife, and such failure of children, as to 4000*l.* of said Bank Annuities for said *Juliana*, her executors, &c. in case she should survive *George Henry Crutchley*, and there should not at his death be any son; and as to the residue of said second mentioned moiety of said 15,148*l.* 11*s.* 1*d.* Bank Annuities in the event last mentioned in trust for *George Henry Crutchley*, his executors, &c.: but in case of the death of *Juliana* in his life, or in the event of her surviving, and there being a son living at his death, then as to the whole of the said second mentioned moiety of said 15,148*l.* 11*s.* 1*d.* Bank Annuities in trust for *George Henry Crutchley*, his executors, &c.

The Bill was filed by the trustees in the settlement, and *Thomas Duffield*; suggesting the intention of the parties to settle the said two-third parts of the portion according to the Will; but that the settlement is not according to the Will; and particularly, that *George Henry Crutchley* is not entitled to a life-interest in the dividends of the said stock; that no contingency ought to be annexed to the portions of the children; and that the share of the eldest son in the said Bank Annuities should not be divested, in case he dies under twenty-one; but,

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if the same is subject to any contingency, it should be only in case he dies under twenty-one and without issue, or that a younger son becomes entitled to the estate as an eldest son; and that the sum of 5000*l.* ought to be limited, not to the younger children of the said marriage only, but also to any children *George Henry Crutchley* may have by any other marriage; and accordingly praying, that it may be declared to have been the intention to settle the said annuities and the said 5000*l.* according to the condition in the Will; that the right of *George Henry Crutchley* and of his eldest son and other children may be declared as to the said 15,148*l.* 11*s.* 1*d.* Bank Annuities, and the said sum of 5000*l.*; that the mistakes in the settlement may be rectified; and that the Master may approve a proper settlement as to the said annuities, and a proper declaration of trust as to the said sum of 5000*l.*

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The answer of *George Henry Crutchley* and his wife insisted, that the intention of the testator was, that *George Henry Crutehley* should receive the interest of the portion for his life; and, as the testator did not point out any particular mode of settling the said portion for the benefit of the children of *Crutchley*, he had a right to annex such contingency to the portions of their children as is contained in the settlement.

Sir *Samuel Romilly* and Mr. *Bell*, for the Plaintiffs.

The question is, whether this settlement is a due execution of the Will; whether there is in this Will a direction for a settlement on any person except the children. What authority has this Court for directing a settlement upon the father and the children? The only proper course is, that, by which the children, and the children alone, will take: whether before or after the age of twenty-

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twenty-one: but it must be confined to the children. There are but two possible constructions: the testator intended either, that the fund should be secured for the children, and them alone, or that some settlement should be made, under which they would take some interest: an interest, as is contended, merely contingent: if they live to a certain period. The latter construction, assuming, that an interest, however remote or contingent, will answer the object, is inadmissible; and then there is no other course except to secure the property to the children absolutely.

Mr. Richards and Mr. Wingfield, for the Defendants *George Henry Crutchley* and his Wife.

With regard to the first point, whether this settlement is proper in giving the interest of two-thirds of the portion to the husband for his life, the object of the testator was to secure that proportion to the children. No intention of accumulation for the benefit of the younger children appears; which, though not uncommon, requires a direction for it; and, if it can be attributed in this instance, must extend to the end of the life of one of these persons, however long: no time of payment being pointed out: nothing to guide the Court, except this general direction, that the fund shall be settled. That expression has no technical meaning; and must be considered as a short direction to the conveyancer; to be interpreted according to the usual course of settlement; giving an interest for life to the father; the mother being excluded by her jointure. In the case of *Brograve v. Winder* (84) the direction to settle upon the issue was not confined to a strict settlement, excluding the father: but there is certainly some difference of opinion with regard

gard to that case. The peculiar anxiety of this testator appears to establish his name, and, according to the common expression, to make a family; of which he intended his nephew to be the head.

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This settlement, with regard to the interests, given to the children, is as correct and reasonable as that in *The Duke of Newcastle's Case* (85). There is nothing technical, calling for any precise mode of executing this direction; which may well be considered as more duly followed by this course than by a settlement, under which the father upon the death of one of the children under the age of twenty-one would take that share, instead of the surviving children. This Court will adapt the construction to the subject; according to the usual habit upon marriage articles; as in the common case by reducing words of limitation to words of purchase, upon a presumed intention in favor of the children.

Sir Samuel Romilly, in Reply.

The cases, referred to, except *Brograve v. Winder*, have no application; arising upon a disposition of chattels, to go with real estate as far as the rules of Law and Equity would permit: the only question being, in what mode that direction was to be executed, so as to carry the intention to the utmost extent in favor of those persons, who were to take. The decision in *Brograve v. Winder* (86) stands upon no principle.

The Lord CHANCELLOR.

I really do not understand, upon what ground that case could have been so decided. How was the Court authorized

(85) *The Countess of Lincoln v. The Duke of Newcastle*, ante, Vol. XII, 217.  
(86) *Ante*, Vol. II, 634.



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rized to interpose an estate for life to the husband? If the husband survived the wife, how could that be represented as a settlement upon her for life, and after her death upon the children? Taking the direction in the Will to be executory, that the money "shall previous to any marriage contract she may enter into be securely settled upon her for the term of her life, and after her death upon the issue of her body, and in default of such issue to her own right heirs," that was a trust, that might have been executed when no marriage was in contemplation; and if at the instant that, previously to any marriage contract whatsoever, the real estate was converted into money the trustees had covenanted to stand seised to the uses of the Will, she would have taken an estate for life; which, if she afterwards married, would have gone to her husband in her right: but an estate for life interposed for him, without any direction, and, though the settlement might not have been made upon marriage, would not have been conformable to the trust.

Certainly the word "settled" does sound something like executory: but it would be very dangerous for this Court to trust itself with the inference, that there may be more objects to take the benefit than those, who are described as the persons, upon whom the settlement is directed. With regard to the sum of money, to be settled upon the eldest son, I do not know any course of conveyancing, in which that could be directed. If a sum of money is to be settled upon younger children, the person, who has the power to charge for younger children, might introduce limitations over, clauses of survivorship, &c.: but if there is no more than a direction, that a sum of money shall be settled upon the eldest son, what time is to be introduced as to vesting; and how is it to be given over upon failure of that son, the only object mentioned? It is made to vest in the eldest son at the  
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Sir *Samuel Romilly* and Mr. *Johnson*, in support of the Petition of the Bankrupt. Mr. *Richards*, for the Assignee.

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THOMAS,  
*Ex parte.*

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Upon the petition of the assignee under the last Commission it is clear, that he is not entitled to the relief he prays; to be at liberty to deduct from the debt, which he has proved, the taxed costs of a former Commission, sued out by him improperly; which was ordered to be superseded at the expence of the petitioning creditor. That Order was made, before the new Commission issued: but the costs were not taxed, and consequently there was no liquidation of the debt, previous to the bankruptcy. The costs therefore, not being a debt, until taxed, became a debt, due to the bankrupt, after the Commission issued; which cannot possibly be set off against a debt, due from the bankrupt before his bankruptcy. That petition must therefore be dismissed.

This relieves me from another difficulty, as to the claim of the solicitor; who seeks to establish a lien upon the taxed costs, ordered to be paid to the bankrupt by the petitioning creditor; whose claim of set-off would have introduced a question, whether, if it should be established, that right would interfere with the solicitor's lien upon the debt recovered; which undoubtedly prevails in general cases. The Court of King's Bench hold their former doctrine, that the Equity of set-off shall not interfere with the lien: the Court of Common Pleas on the contrary hold, that the attorney can have no lien, that will interfere with the equity between the parties (79); and my opinion is, that the practice of this Court \* does not interpose the lien farther than upon the clear balance, which is the result of the equity between the parties.

[ \* 542 ]

(79) Ante, 75, 79, *Taylor v. Popham*, and the note.

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Sir Arthur Piggott and Mr. Benyon, for the Children.

The question is the same, that would have arisen at law, if after the husband's death the wife had destreined for her rent-charge; whether, considering this settlement it was valid. The power to make the rent-charge is, not absolute, but subject to the condition expressed for settling not less than two-thirds of the portion upon the children in the proportions mentioned.

The father, taking absolutely one-third of his wife's portion, two-thirds only being directed to be settled, has a full compensation for any interest, which he could possibly claim under that direction; and the intention was, that the accumulation should be included. The reason therefore for implying an interest for life to him fails. The Court cannot refuse to the eldest son the absolute interest in his proportion. It cannot be represented, that the condition is properly executed by settling these two-thirds, not absolutely, but subject to an interest for life in the father, and to a contingency as to the time of vesting; an intention not expressed, and not to be implied by conjecture against these plain words; especially where he takes absolutely for his own benefit so considerable a part as one-third of the portion.

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*The Lord CHANCELLOR.*

Feb. 7th.

Upon looking through this Will my opinion remains, as I have expressed it. With regard to the actual intention I have no doubt, individually: but this is not the principle, which is alone to regulate my judgment, construing a Will in this place. The testator settles his real estate through his nephews, as tenants for life, and through their issue male; giving a power of jointuring the wives of the tenants for life; and requiring in the form of condition, that two-third parts of the portion should be settled

settled upon the children: the husband taking the remaining third; and clearly providing, that those two-thirds of the lady's fortune should go to her own children. As to the sum of 5000*l.* which the nephew had the power of limiting, that is not confined to any particular children; but extends to his younger children by any marriage. The expression "the eldest son," in the direction for a settlement, admits, and must receive, a construction, which will shift that description from one individual to another, from time to time; as a younger son might happen to become the eldest.

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With regard to the other point, it is true, as Sir *Arthur Piggot* has observed, that the husband takes one-third of the portion for his own benefit: but that makes no difference. The direction to settle two-thirds must receive the same construction as if, the husband taking nothing, it had extended to the whole; as in *Brograve v. Winder* (88); in which case there was nothing but the simple direction for a settlement upon the wife and her issue to authorize the construction, that was made. That ought to a certain extent to govern me; and I am persuaded upon the whole of this Will, that the idea was, not to accumulate, but that this fund should be preserved, and settled, in the same sense as the real estate was settled; and the exclusion of the wife is consistent; as by the rent-charge he became a purchaser. I agree with the argument, that this is a limitation of a legal rent-charge upon a condition: but that condition ought to have this construction at law.

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It was then suggested, that the limitation over ought to be upon the death of the son without issue, generally; not merely without issue male.

*The*

(88) *Ante*, Vol. II, 534.

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I do not think so ; a younger son, by the death of the elder becoming the eldest son in the construction of this Court, would in that character be entitled to the other third of the portion : but he never could become the eldest son, and cease to be the youngest, 'within that clause, if the son, who was actually eldest, left issue male ; as then that third would go with the real estate. That third is according to my opinion to go in settlement, as the land would go : the son leaving issue male, it would go with the land : but leaving issue female only, they would be separated. It is impossible to deny, that this is a very difficult case.

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The Decree declared, that it was the intention of the parties to settle the Bank Annuities, being two-thirds of the portion, in the manner, directed the Will of *Jeremiah Crutchley* ; and that by virtue of such Will *George Henry Crutchley* is entitled to the dividends thereof for his life ; and that the interest of an eldest son of the said *George Henry Crutchley* ought not to be devested, unless he dies under the age of twenty-one and without issue male.

The Decree farther declared, that the sum of 5000*l.*, which by *Jeremiah Crutchley's* Will *George Henry Crutchley* has power to charge for the benefit of his younger children, is a sum to be raised for the benefit of all the younger children of *George Henry Crutchley* by his present or any future wife ; and it was referred to the Master to look into the settlement ; and to rectify the same according to the intent of the parties, as expressed in the agreement, therein recited, and the true intent and meaning of *Jeremiah Crutchley* ( 89 ).

YOUNG v. KEIGHLY.

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ROLLS.

1808.

June 1st, 2d.

Assignment

**T**HE Bill stated, that the Plaintiff in *August*, 1794, lent to the Defendant and his then partner *Richard Beckford* 10,000*l.*, upon the security of their joint and several bond, dated the 12th of *August*, 1794; and by indentures, dated the 31st of *March*, 1795, *Beckford* and the Defendant covenanted, that they would on the 80th of *September* next, at the option of the Plaintiff, transfer to him 16,096*l.* 11*s.* 7*d.* 8-*per cent.* Consolidated Bank Annuities, or pay him the said sum of 10,000*l.*, and in either case pay the interest; and farther to secure such transfer or payment, the Defendant assigned to the Plaintiff 8,500*l.* *East India Stock*, subject to redemption on payment of the 10,000*l.* and interest.

The transfer was not made; nor was the principal money paid: but the interest was paid to *August*, 1799. The Plaintiff pressing for his money, the Defendant proposed to pay the debt by instalments of six and twelve months; and that farther security should be given; and by a letter, dated the 17th of *April*, 1800, he proposed to give a bond, signed by himself, and *Ferguson* and *Armstrong*, "being the present firm;" and stated securities, which they had upon estates in *Jamaica* by bond and mortgage.

The Bill, insisting, that this letter is a binding contract by the Defendant to execute an assignment of those securities, prayed a specific performance, and an assignment accordingly.

The Defendant by his answer submitted, whether the letter was a binding contract; and that, having become

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so much embarrassed in his affairs as to be under the necessity of stopping payment and assigning his affairs to trustees for the benefit of his creditors, he conceived himself not at liberty to execute any transfer or assignment of any part of his estate to an individual creditor.

A supplemental Bill was filed; stating, that the Defendant *Keighly* and his partners executed an assignment, dated the 20th and 21st of *July*, 1800, for the benefit of their creditors to the other Defendants.

By a Decree, pronounced at the *Rolls* on the 16th of *February*, 1805, it was declared, that the Plaintiff was entitled to a specific performance of the agreement against the Defendants *Keighly* and the trustees; and an inquiry was directed, what legal or equitable interest *Keighly* had in the said securities on the 17th of *April*, 1800.

The Master's Report stated the securities by mortgage upon the estates in *Jamaica* to *Keighly*; and an agreement, dated the 1st of *January*, 1800, for a partnership between *Keighly*, *Ferguson*, and *Armstrong*; providing, that all the securities for money, shares of ships, and debts, due to *Keighly*, in respect of his mercantile house, as it stood on the 30th of *April*, 1799, subject to the debts and engagements, affecting the same, should become the joint property of the new firm in certain proportions, according to the proportions of capital, agreed to be bought in by *Ferguson* and *Armstrong*; but that they had advanced only part of the sums they were respectively to bring in. The Master therefore stated, that he did not find, that *Keighly* ever parted with the legal or equitable interest in the said securities other than by the articles of partnership and by the trust-deed; and accordingly found, that *Keighly* had on the 17th of *April*, 1800, an equitable interest in two of the *Jamaica* estates,  
 and

and a legal or equitable estate in another, to the extent of his advances upon those estates respectively; subject only to such rights as *Ferguson* and *Armstrong* had acquired by the articles of partnership of the 1st of *January*, 1800: and, that, not having paid the full capitals, which by the said articles they were bound to advance to the joint concern, although required by *Keighly* to do so, they did not become entitled to two-eighths and one-eighth respectively in the said securities; but at the most were entitled only to such proportion as their respective advances bore to the full capitals, which they ought to have advanced.

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To this Report exceptions were taken by the trustees; contending, that the Master ought to have found, that *Keighly* had not upon the 17th of *April*, 1800, any interest whatsoever in the said estates or sums of money, except as partner in the house of *Keighly*, *Ferguson*, and *Armstrong*; or, if he had any separate interest, it was only such legal or equitable interest, as he had as creditor for the deficiency of the advances of his partners; and that he was a trustee thereof for the partnership; insisting farther, that the Master ought to have certified, that *Ferguson*, and *Armstrong*, and *Keighly*, were jointly entitled to the said securities, or the beneficial interest in the same, as partners.

Sir *Samuel Romilly* and Mr. *Bell*, in support of the Exceptions.

This claim of lien upon *Keighly's* interest cannot be maintained against the creditors of the partnership. In the case of *Taylor v. Fields* (90), the only instance of such

(90) Ante, Vol. IV, 396. note, 239. XI, 85. *Barker*  
See ante, 229. *Hankey v. v. Goodair*. The case of  
*Garratt*, Vol. I, 236, and the *Taylor v. Fields* was decided  
under



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such an attempt, *Fields*, a partner, had permitted a judgment to be obtained against him; under which joint property

under these circumstances. The Bill was filed by the assignees of *William Robinson* and *Edward Fields*, bankrupts, and the Sheriffs of *Middlesex*, against *Robert Fields*; stating the partnership between *Robinson* and *Edward Fields*, in the trade of linen-draper; and that *Robinson* brought into the partnership 1000*l.*, and *Fields* 500*l.*, as their respective capitals; that *Fields* drew out more than his share in the trade; and pledged the name of the partnership for his own private accommodation. The Bill farther stated, that shortly before the Commission, which issued upon the 26th of *April*, *Edward Fields* and *Robert Fields* formed a scheme to get into their possession part of the partnership effects; and for that purpose *Edward Fields* gave to *Robert Fields* a bond and warrant of attorney to confess judgment for a pretended debt of 500*l.*; upon which judgment was entered up; and a writ of *Fieri Facias* issued, directed to the Plain-

tiffs, the Sheriffs of *Middlesex*; who took in execution all the partnership effects, as well as the separate effects of *Edward Fields*; but the Sheriffs, having received notice, and being indemnified by the joint creditors, and *Edward Fields* having committed acts of bankruptcy, gave up the partnership effects; and sold only the separate effects, and the Defendant had commenced an action against the Sheriffs for a false return. The Bill prayed, that the assignees may be quieted in the possession of the partnership effects: an Injunction; and an account of what was due from the Defendant to the assignees, and payment.

The answer stated, that the debt, due from *Edward Fields* to the Defendant, was the separate debt of *Fields*; but it was a *bond fide* debt, and for a full and valuable consideration. The Defendant obtained judgment; and sued out execution upon the 12th of *April*, 1797; and upon the 13th of *April* a meeting

perty was taken in execution. A bankruptcy followed; and the assignees filed the bill for injunction and account; and,

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meeting of the creditors of the partnership took place, at which the Defendant attended; and informed the creditors of his execution, and thereupon *Robinson* and the creditors concerted the bankruptcy; in order to defeat the execution. The Defendant therefore insisted on his right to proceed in his action against the sheriffs.

Upon an application for an injunction on the 25th of *June*, 1797, an Order was made, that the assignees should pay into Court 640*l.* without prejudice; and in default thereof that the Defendant should be at liberty to proceed in the action; and an account was directed of the separate estate and interest of *Edward Fields* in the partnership estate and effects of *Robinson* and *Fields* at the time of levying the execution; and the Master to state what was due to *Edward Fields* on that account. An account was also directed of the interests of *Fields* and *Robinson* in the partnership

effects, as between them, and to ascertain *Fields's* share; and in the mean time an Injunction was granted.

The Master's Report stated the articles of partnership; by which *Robinson* was to bring in 1000*l.* and *Fields* 500*l.*: *Robinson* was to be entitled to two-thirds of the stock, and *Fields* to one-third; and *Robinson* was to be at liberty to draw out 10*l.* and *Fields* 5*l.* per month. Upon the day of the execution the whole of the partnership estate and effects was of the value of 2000*l.* 3*s.* 9*d.* exclusive of debts, due by the partnership; and *Edward Fields's* interest therein was 666*l.* 14*s.* 7*d.* being one-third; and as to the inquiry, whether any thing was actually coming to *Edward Fields* from the partnership at the time of the execution, the Report stated, that upon the 27th of *November*, 1796, there was due to *Robinson*, over and above his capital of 1000*l.* the sum of 1041*l.* 4*s.* 11*d.* which, being deducted from

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and an account was directed of the separate interest of *Fields*, and of the partnership effects; and, as it appeared, that there was no balance after satisfaction of the partnership debts, the decision of the Court was against the claim under the execution; and the *Lord Chief Baron*,

the partnership effects, left 958*l.* 18*s.* 10*d.*; whereof one-third, 319*l.* 12*s.* 11½*d.* was the share of *Edward Fields*: but he had overdrawn the proportion he was entitled to draw out of the partnership effects, to the amount of 60*l.* 14*s.* 10*d.*; whereof two-thirds being *Robinson's* proportion, ought to be deducted from the above sum of 319*l.* 12*s.* 11½*d.* which left a balance of 279*l.* 3*s.* 6*d.* which the Master certified to be coming due to *Edward Fields* in respect of his separate estate and interest in the partnership at the time of levying the execution, and to be the amount of his interest therein as against *Robinson*. The Report then stated what *Robinson* was entitled to, corresponding with the above statement.

An exception was taken by the assignees to the Report; as stating, that there was coming due to *Edward*

Fields in respect of his separate estate and interest in the partnership, at the execution of the articles, 279*l.* 3*s.* 6*d.*; whereas the Master ought to have reported, that *Edward Fields* had no separate estate or interest whatsoever, as it appeared before him, that at the time of levying the execution, after payment of all partnership debts then due, there was not any such balance.

The authorities referred to at the Bar were *Richardson v. Goodwin*, 2 *Vern.* 293. *Heydon v. Heydon*, 1 *Salk.* 392. *Jacky v. Buller*, 2 *Lord Raym.* 871. *West v. Ship*, 2 *Ves.* 242; and the passage, stated by Lord Mansfield in *Fox v. Hanbury*, *Coup.* 445, from Lord Hardwicke's judgment in *Skipp v. Harwood*.

The Exception was allowed; and the Injunction was made perpetual.

Baron, in his judgment, so far from conceiving, that the former cases were determined upon the ground of bankruptcy, observes, that bankruptcy makes no difference; as the assignees are by the Act of Parliament in the very same situation, as the bankrupts are at Common Law. The individual creditor had at least as strong a lien upon the joint property, taken in execution for his separate debt, as this Plaintiff, claiming under an agreement by one partner to assign part of the joint stock: the others under total ignorance of that proceeding in the partnership transactions. Can a part of the joint stock be thus withdrawn from the engagements of the partnership? The consequence would be most serious, as any partner would have the power of ruining the concern. If this can be maintained, the course in bankruptcy to pay the joint debts out of the joint property, before the separate creditors can take any part of it, according to the case of *Goss v. Du Fresnoy* (91), which has been followed ever since, is wrong. Suppose, instead of the failure of this partnership, it had determined by agreement: could any part of the partnership property have been claimed by either partner as his own, the effect of his separate and private act? If that is not to be maintained, can a creditor support a claim under a separate and private transaction with one partner? The effect of the contract of partnership is, that the whole property is pledged to the partnership debts, in preference to any other purpose. Nothing therefore can be received under this claim, until the joint accounts shall be settled; when, if any surplus shall be coming to *Keighly*, the Plaintiff will have a lien upon that.

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Sir *Arthur Pigott* and Mr. *Leach*, for the Plaintiff, admitted the application of the decision in the case of *Taylor*.

(91) 1 *Cooke's Bank. Law*, 528; 8th edit. by Mr. *Roots*, 522.

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 YOUNG not been impeached; intimating however some doubt  
 v. upon the principle.  
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ROLLS. *The MASTER of the ROLLS* said, the case of *Taylor*  
 1808. *v. Fields*, was decisive against the Plaintiff; and he saw  
 June 2d. no reason to dissent from that determination.

The Exceptions were accordingly allowed; and the bill was dismissed.

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## WIGHT v. LEIGH.

1809.  
 Feb. 17th, 18th.

Devise to A.  
 and after his  
 death to his  
 first and other  
 sons, and in  
 default of male  
 issue then unto  
 his eldest and  
 other daugh-  
 ters, and to  
 their heirs  
 male for ever.  
 An estate in  
 tail male in A.

**ELIZABETH HARRINGTON CHAUNLER**,  
 being seised of real estate in the counties of *Essex*  
 and *Surrey*, for her life, with remainder to the Plaintiff  
 for life, without impeachment of waste, directly as to one  
 moiety, and, as to the other, after a previous limitation  
 to *William Martin* for life, and to his children, as te-  
 nants in common in tail, with remainder, as to her reversion  
 in fee, to the trustees in her marriage settlement and their  
 heirs, upon trust to convey such reversion in fee to the  
 use of such persons, for such estates, &c. as she should  
 by Deed or Will appoint, by her Will, dated the 8th of  
*October, 1794*, gave all her real estates in *Essex* and *Surrey*  
 to her husband, *John Chaunler*, in case he survived her,  
 during his life; and after her husband's decease she gave  
 the said *Surrey* estate to the Plaintiff; and after his  
 death she gave the same to his first and other sons; and  
 in default of male issue then she gave the said estates  
 unto the eldest and other daughters of the Plaintiff, and  
 to

to their heirs male for ever, on condition they should take the name of *Wight*, and no other.

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The testatrix and her husband being both dead, the bill was filed; the Plaintiff claiming an equitable estate tail in remainder under the Will of *Elizabeth Harrington Chaunler*; and praying, that the trustees may be decreed to convey the legal estate in remainder in the moiety of the estates accordingly. The Plaintiff had four children: his eldest son of age, but out of the jurisdiction; the other three being daughters.

Sir *Samuel Romilly* and Mr. *Roots*, for the Plaintiff.

The only way, in which a sensible construction can be given to this Will, is by giving an estate tail to the Plaintiff; who has a legal estate for life now vested in him. The testatrix gives the estate to him, not for life, but generally; and after his death to his first and other sons; not expressing, what interest they were to have; and in default of male issue then to the eldest and other daughters, and to their heirs male for ever, on condition that they shall take the name of *Wight*. She clearly intended succession; and that the estate should go to all the Plaintiff's male issue in the first place, before the daughters can take: an object, to be effected only by giving him an estate tail. His sons cannot take estates tail, the limitation over being not in default of issue of them, but in default of male issue; which must have reference to the Plaintiff, taking the first estate.

The case of *Doe v. Applin* (92) has a considerable  
•resemblance to this; upon a devise, not so strong in  
favour of the construction, giving an estate tail to the  
first

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first taker; with which the words of distribution "to and amongst," are certainly so far inconsistent. *Robinson v. Robinson* (93), is another instance of an estate tail implied from the manifest intent against an express devise for life and no longer.

Mr. Hart and Mr. Bell, for the Defendants.

Upon the manifest, and not inconsistent, intention, to be collected from the whole of this Will, there is no occasion to resort to authorities. In *Doe v. Applin*, *Robinson v. Robinson*, and other cases of that class, the difficulty arose from two inconsistent objects, apparent upon the Wills: both could not be executed: from necessity therefore the particular object, an estate for life, expressed in direct terms, with the additional words "and no longer," in one instance, gave way to the general intention to carry on the limitation through the Issue; which could not in *Doe v. Applin* be construed children, as it was in *Seaward v. Willock* (94); where, besides the general intention, that the estate should continue in the family as long as possible, there were two particular objects: one, that the first taker should have an estate for life only; another, that each son, to the tenth generation, should take an estate for life.

In this case the general and the particular intention may both be executed by giving the first taker an estate for life only; which is the legal construction, where there are no words of limitation; and the intention could not appear in more explicit terms than by a gift to a person, and immediately after his death a limitation over. By giving the father an estate tail the limitation to the first and other sons is expunged from the Will; which is a *Descriptio Personæ*, as much as a limitation to an existing

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(93) 1 Burr. 38.

(94) 5 East, 198.

ing son by name; pointing also to that order, in which estates are usually limited with the view to succession according to priority of birth. Every word must have effect. Admitting, that a failure of issue male was to take place, before the limitation to the daughters could have effect, it is not true, that the intention can be executed only by an estate tail to the father. The words "in default of issue male" may apply, not to the Plaintiff, but to the immediate antecedent, the first and other sons: a construction more grammatical, more consistent with the general plan of the devise, and approaching, as near as can be, the ordinary language and course of settlement. The conclusion is, that this is an estate for life to the first taker; with a remainder in tail male to his first and other sons.

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Sir Samuel Romilly, in Reply.

Under these words the sons cannot possibly take estates tail: no interest being mentioned in the limitation; and in default of persons to take under the prior limitation estates in tail male being given to the daughters by express and technical terms. The conclusion is inevitable, that the testatrix by that short limitation to the sons could not have the same meaning; shewing plainly, that she perfectly well knew how to create an estate tail to the sons. Her intention therefore must be this: understanding that by an estate tail in the father the sons would take successively, if the estate before given cannot take effect, and by the failure of issue male of the first taker there can be no succession in his sons, then the daughters shall take. It was certainly very difficult in *Doe v. Applin* to get over the words of distribution. The Court was under the necessity of considering them as having no operation.

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The MASTER of the ROLLS, observing that *Seaward v. Willock* was only a series of estates for life, without any limitation



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limitation in default of issue, expressed his opinion, that this was an estate tail in the Plaintiff; that the devise was to be construed, as if it ran to him and his issue male; but said, he would look at the Will.

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*The MASTER of the ROLLS.*

Feb. 18th.

The evident intention of this testatrix was to prefer all the male issue of somebody, either of the Plaintiff, or of his first and other sons, to the daughter: but she has not given such an interest to any one, as would enable male issue, generally, to take; for all, that is given to the Plaintiff, is what amounts in law to an estate for life, and so it is with regard to the estates given to his first, and other sons. It is necessary therefore, in order to effectuate the general intention in favor of issue male, to consider some of the antecedent takers as having by implication such an estate as would enable all the issue male to take; which can only be by giving an estate tail either to the father, or to his first and other sons. The male issue intended must, I think, be the male issue of the father, not of the sons. Nothing is before mentioned of any issue male of the sons: whereas there is a certain description of male issue of the father before spoken of, viz. his first and other sons. Therefore the failure of issue male intended must be of issue male of the father, rather than of the sons. When the Court has determined, what is the effect of the limitation, it is the duty of the trustees to convey accordingly; and the construction I put upon this Will being, that this is a limitation to the issue male of the father, they must so make the conveyance.

The GOVERNOR and COMPANY of the BANK  
of ENGLAND v. LUNN.

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11th.

**T**HE Bill stated, that *Renè Labutte*, being at the time of making his Will and of his decease possessed of the sum of 2300*l.* 4-*per cent.* Consolidated Bank Annuities, standing in his name, by his Will, dated the 13th of *May*, 1789, directed his executrix within one month after his decease to sell and dispose of “ 1000*l.*, “ in the 4-*per cent.* Consolidated Bank Annuities,” and pay the money arising therefrom unto Messrs. *Senard* and Co. at *Paris*, (whose receipts the testator declared should be a full and sufficient discharge to his executrix for the same) upon this special trust and confidence; that they shall place the same out at interest, and pay and apply the interest for and towards the board and maintenance of *Genevieve Clare Forget*, widow, now residing at *Paris*, and for and towards the support, maintenance, and education, of *Pierre Forget*, and his brother or sister, her two children, until such children shall attain their legal ages according to the laws of *France*; and upon their respectively attaining such age, the principal to be paid between them equally; with survivorship, if either should die without issue; and, if both should die, to the mother. The testator farther directed his executrix to sell and dispose of “ the further “ sum of 100*l.* Stock in the said 4-*per cent.* Consolidated “ Bank Annuities,” and pay the money unto Messrs. *Senard* and Co. for their care or trouble in the execution of the trust. He gave the residue of his personal estate to his wife *Mary Labutte*; whom he appointed sole executrix.

Demurrer allowed to a Bill by *The Bank of England* for an Injunction against the Action of an Executor, claiming a transfer of Stock. Considering the Stock as specifically bequeathed (which was doubtful) to trustees in *France* upon special trusts, if the Executor cannot maintain the Action, upon the nature of the bequest, or as having assented, the Injunction is unnecessary: if he can, upon his title to the Stock, to be applied as the other property, there is no Equity.

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By a codicil, dated the 19th of *December*, 1789, the testator revoked the bequest "as to the said sums of " 1000*l.*, and 100*l.* Stock in the 4-*per cent.* Consolidated " Bank Annuities," and directed his wife within one month after his decease to sell and dispose of " the sum " of 500*l.* Stock in the said fund only," and pay the money unto *Senard* and Co. with the same declaration as was contained in the Will, that their receipts should be a discharge; and directed them to retain the sum of 50*l.* thereout for their care and trouble in and about the trusts committed to them; and the residue of the money to arise from the sale of the said 500*l.* Stock, he directed *Senard* and Co. to pay, &c. as was mentioned in the Will with respect to the sum of 1000*l.* Stock, thereby directed to be sold; and he farther directed his said executors to set apart and appropriate " a further sum of " 500*l.* Stock in the said fund," for the purposes after mentioned: viz. that his wife should receive the dividends during her life; and after her decease he gave " the said " last-mentioned sum of 500*l.* Stock" unto the said Messrs. *Senard* and Co. upon trust to be by them paid, &c. unto *Genevieve Clare Forget*, and her said two children, as directed by the Will with respect to " the said sum of 1000*l.* stock, thereby directed to be " sold:" but in case they shall all die in the life of his wife, the last-mentioned 500*l.* should become the property of his said wife absolutely.

By another Codicil, dated the 4th of *April*, 1790, reciting the bequest in the Will and the former Codicil, the testator revoked, not only the directions in his Will " as " to the sale of the said sums of 1000*l.* and 100*l.* Stock " in the said 4-*per cent.* Consolidated Bank Annuities," but also the appointment of his wife to be sole executrix; and he farther revoked the said recited codicil, and directed his said wife *Mary Labutte*, " to set apart and " appropriate the sum of 1000*l.* Stock, in the 4-*per cent.* " Consolidated

"Consolidated Bank Annuities, for the uses and purposes "hereinafter mentioned," viz. that his said wife shall receive the dividends and produce thereof, from time to time, during her natural life; and immediately after her decease he gave "the said sum of 1000*l.* in the said "fund, unto the said Messrs. *Senard* and Co.;" declaring, that their receipt shall be a full and effectual discharge to his executor hereinafter named, for the money arising from the sale of the said Stock; and he authorized and desired them to retain thereout the sum of 100*l.* for their care and trouble in and about the trusts by him committed to them; and "the residue of the money to arise "from the sale of the said 1000*l.* Stock," he directed *Senard* and Co. to pay, apply, and dispose of, unto and for the benefit of the said *Genevieve Clare Forget*, and her two children, in the same manner in every respect as in his said Will is particularly mentioned, "with respect "to the sum of 1000*l.* Stock in the said fund, thereby "directed to be sold:" but, in case the said *Genevieve Clare Forget*, and her said two children, shall all happen to die in the life of his wife, he directed, that "the said "sum of 1000*l.* Stock hereinbefore directed to be set "apart for the purpose aforesaid," shall in such case become the property of his said wife absolutely; and he appointed his said wife *Mary Labutte* whole and sole executrix of his last Will and Testament during the term of her natural life; and from and after her decease he appointed the Defendant and another person joint executors thereof.

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The Bill farther stated the death of the testator on the 20th of *May*, 1790; that his widow *Mary Labutte*, proved the Will and Codicils; and possessed herself of the testator's personal estate, more than sufficient, exclusive of the said 1000*l.*, 4*per cent.* Consolidated Bank Annuities, to pay all the testator's debts; and she did
thereout

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thereout pay them all. *Mary Labutte* died on the 11th of *July*, 1808; having made the Defendant, her nephew, her residuary legatee and one of her executors; who alone proved her Will.

The Bill then stated, that the said sum of 1000*l.* 4*-per cent.* Annuities is still standing in the Plaintiff's books, in the name of the testator *Renè Labutte*; that the Defendant required them to permit him to transfer the Stock into his own name; which they declined, unless he would produce properly authenticated documents to prove the deaths of *Genevieve Clare Forget*, and her two children, in the life of *Mary Labutte*; charging, in opposition to the various pretences stated, that all the debts were paid; that the family of *Forget*, or some person in their right, is entitled to the produce of the Stock, after paying the sum of 100*l.* to *Senard* and Co.; that *Senard* and Co. and the *Forgets* never have had notice of the said bequests, being resident in *France*. The Bill therefore prayed, that the Defendant may be decreed to transfer the said 1000*l.*, 4*-per cent.* Consolidated Bank Annuities, into the name of the *Accountant-General*, in trust in this cause; and that it may be impounded and secured, until it can be ascertained, what persons are entitled, or beneficially interested therein; and when that shall have been ascertained, that the Stock may be applied and disposed of according to the second Codicil, and that the Defendant may be restrained from proceeding in the action.

The Defendant put in a general demurrer to the whole discovery and relief, sought by the Bill, for want of Equity.

Sir *Samuel Romilly* and Mr. *Hall*, in support of the Demurrer.

It is clear, that by this Will the Bank are not constituted

tuted trustees: if therefore they can have any right to resist the demand, their defence must be at law. In all these cases the Bank have discovered great reluctance to be considered trustees; conceiving themselves not to be answerable for any breach of trust. There are two authorities, clearly deciding that question: *Hartga v. The Bank of England* (95); and the *Bank of England v. Parsons* (96). In the former of those cases, on a charge of misapplication of the fund, the Bank found it convenient to maintain the point, contended by this demurrer. The ground on which the Court proceeded in the latter case, is, that there is no distinction between the Bank and any common debtor. Why has not any other debtor, whose debt is the subject of a specific bequest, an equal right to file a Bill to restrain the executors, proceeding by action? There is no possible distinction, except the inference in the latter instance, that the object is merely delay. This is however much stronger than the case, put by the *Lord Chancellor*, of a specific bequest of a debt. Though this stock is specifically bequeathed, the purpose is, that it may be immediately sold, and the produce paid to persons residing in a foreign country. Whether those persons were living or dead, the executor is entitled: in the one case legally: in the other both legally and equitably; and in the former case, unless he receives it, the intention cannot possibly be executed. The testator foresaw, that a trust of this nature could not be carried into execution; and for that reason appointed foreigners, as secondary trustees, to make the application. If this Bill succeeds, the consequence will be a Chancery suit, wherever there is a specific bequest of stock. The Bank must look only to the legal title; and can look no farther. That title is vested  
in

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(95) Ante, Vol. III, 55.

(96) Ante, Vol. V, 635.

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in this Defendant: the sole personal representative both of the testator and his widow; and in that character he has imposed upon him an imperative duty to perform. How can the *cestui que trust* give a discharge, until the money is produced; and how can it be produced except by sale of the stock? There are therefore united in this executor a legal title, and an imperative trust to act.

Sir *Arthur Piggot* and Mr. *Wooddeson*, for the Plaintiffs.

This is a specific disposition of stock to *Senard* and Co. to whom it ought to be transferred; and then certainly upon the principles, established by decisions in this Court, the Bank have no concern in the performance of the trusts. It is not credible, nor is it alleged, that the executor wants this property for debts of the testator, who has been dead eighteen years. The last of the cases cited was, not a specific, but a residuary, bequest: money in the funds being comprised merely as one article of the testator's property. The Bank are not to be considered as trustees or debtors: the only evidence of title to this peculiar species of property is their books; and clearly they would be responsible for permitting a transfer, especially with notice of an intended breach of trust. This property is placed under their management with particular directions as to the mode of transferring it; and they are mere stake-holders. In all the Acts (97), creating these perpetual annuities, this clause is found; and has created much perplexity; authorizing the devise of stock by Will in writing, with two witnesses; but directing, that no payment shall be made upon such devise, until so much of the Will as relates to the stock

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(97) Stat. 1 Geo. I. st. 2. c. 19. s. 12. Stat. 20 Geo. II. c. 19. s. 49.

is entered at the Bank; and that in default of such devise the said stock shall go to the executors or administrators. Considering this as unprejudiced by decision, the construction should have been the same as upon a specific devise of land; the Act of Parliament giving the power, not strictly to devise, but to pass the legal interest; and directing, that no payment should be made without that record of the devise in the books to justify that payment. That entry gives the Bank notice. The cases in *Douglas* (98), and all the other cases, both at law and in this Court, establish, that the Bank are bound to take notice of a specific devise.

This is the third bill filed by the Bank for this purpose; and the first instance of a demurrer. The case of *The Bank of England v. Moffatt* (99) was the case of a residue, not a specific legacy of stock; and the magnitude of the fund was the reason of filing that bill. *The Bank of England v. Parsons* (100) turned upon the same point; that the subject was a residue, not a specific legacy of stock. *Huriga v. The Bank of England* (1) is the only instance of an attempt to charge the Bank with the consequences of a breach of trust; and that failed. From *Pearson v. The Bank of England* (2) to this time there have been four bills filed against the Bank by specific legatees, having partial interests in stock; who, having by contract after the death of the testator consolidated their interests, demanded a transfer. The last of those cases is *Austin v. The Bank of England* (3). That demand has been always opposed by the

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(98) *The King v. The Bank of England*, Doug. 524. 2d edit.

(99) 3 Bro. C. C. 260. Ante, Vol. V, 668, n.

(100) Ante, Vol. V, 665.

(1) Ante, Vol. III, 55.

(2) 2 Bro. C. C. 429.

(3) Ante, Vol. VIII, 522.

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the Bank; insisting, that they cannot take notice of that contract; or permit a transfer, except according to the interests appearing upon the instrument. This case is certainly distinguished from all, that have preceded it. This is a specific legacy to *Senard* and Co.; and the Defendant claims a transfer for his own interest; not for the purpose of performing the trusts of the Will. If the Bank had aided such an object, a suit by the *Cestui que trust* would stand under circumstances very different from those of *Hartog v. The Bank of England*; in which case the executor was clearly a trustee to sell, to pay his own debt, and hold the residue for other persons. In this case a person, who is not the legatee of this stock, desires to make a transfer to the prejudice of the legatees; and the Bank, having notice, are entitled to the protection of the Court.

Sir *Samuel Romilly*, in Reply.

If this bill can be maintained, the consequence will be, that in the case of a specific bequest of stock, even where the debts require the application of that property, a suit must be instituted, before the executor can be permitted to make the application; and all the expence from suffering actions to be brought by creditors, and an account in this Court, to ascertain the amount of the property, not specifically bequeathed, will be incurred. What is the difference between the Bank and any other individual? They are not debtors in the strict sense, that an action of debt may be brought: but an action on the case will lie, with all the consequences. The only distinction is upon the Act of Parliament; which has its operation, if any where, at law. If the effect is to vest, stock, bequeathed by a Will with two witnesses, in the legatee, and not in the executor, the aid of this Court cannot be required. If the Bank are trustees, they must be

be so throughout, with all the consequences; and must therefore be answerable for a misapplication. They cannot consider themselves trustees merely to the extent of embarrassing the *Cestui que trust* with expence. A transfer of the stock into the names of *Senard* and Co. would not fulfil, but would contradict, the intention; which was to avoid the difficulty from the residence of the legatees in a foreign country.

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Upon this Codicil however, taken with the Will, this is not specific.

*The Lord* CHANCELLOR.

This case is in *specie* new. The public stocks are affected by two clauses of the Act of Parliament (4), of the following nature; that the stock shall be assignable and transferable, as the act directs; and that no other method of assigning or transferring it shall be good: provided, that all persons, *possessed of* any share or interest, (which is equivalent to the word "*having*," in the Statute of Wills,) may devise the same by Will in writing, attested by two or more credible witnesses; but that no payment shall be made thereon, till so much of the Will as relates to the stock be entered at the Bank; and that in default of such transfer or devise the said stock shall go to the executors or administrators.

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In all the acts, creating stocks or annuities, there is also a clause, declaring, that those stocks shall not be attached, sequestered, or taken in execution; and in fact they are not liable to payment of debts in any way, while the party is living, except under a Commission of Bankruptcy; Stock not liable to the payment of debts during the life of the proprietor in any way except under a Commission of Bankruptcy.

(4) Stat. 1 Geo. I. st. 2. c. 19. s. 11, 12.

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ruptcy; and I have always doubted, whether the Legislature, who meant to give a sort of peculiar value to stock in the life of the party, did not also mean, that he should have the power of devising it, and that it should go to the devisee, not through the executor or administrator, but by the effect of the devise; and that it should go to the executor or administrator only in default of the devise, directed by that clause.

It happened to me to insist at the Bar early in my life, that there could be no such thing as a specific devise of stock, but where the party had it at the time of the Will; and devised it by a Will with two witnesses; and if that is right, it does not depend upon the executors; but the devise passes it; as it would pass land; which must always be specifically devised. Lord *Thurlow* felt great difficulty upon it; and, as in cases, where the Will was not attested by two witnesses, but purported to give stock in terms, importing a specific bequest of it, the Court has been in the constant habit of acting, and the clauses of the Act of Parliament do not express, what the executors are to do with it, when they have it, Lord *Thurlow* thought that they must take it, subject to debts; and, though there were not two witnesses, yet it was held to be specific.

The difficulty still remains, what are the legal effects of this clause. A practical construction has been put upon it; that, though stock is so devised, or by a direction, making it specific, is specifically bequeathed, still as all other specific bequests, it must have the assent of the executor; and is not then taken out of the reach of the creditors; but is in the situation of all other personal estate, specifically bequeathed. Though this is the practical construction, still I doubt, whether it is agreeable to the intention of the Legislature. That brings it to  
 this

this point; that, though it is specifically bequeathed, and though there is this direction for the entry of that part of the Will in the books of the Bank, yet the devisee in this way of putting it has not the title to it by the effect of the devise until assent of the executor. When that assent is given, the devisee has the property by that assent: or, if it does not fall within the principles resulting from the practice, but the devise itself operates the vesting of the property, he has it by that devise.

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Suppose an action brought against the Bank by the executor: if by the effect of a specific devise the interest is vested, not in him, but in the devisee, that is a defence to the action: the satisfaction by the verdict in an action upon the case, being the value in damages of the thing, not transferred, can be due only to the owner. On the other side, supposing the devise not to operate to vest the property, as a devise of land, not requiring assent, the executor, if he has given his assent, cannot on that account recover: if he has not given it, and the law is, that without it the devise is not effectual, the effect is equivalent to a direction in the Will, that the property is to be considered as belonging in law to the executor until assent, or until some act done by him to divest it: if therefore the devise is specific, and it does not vest the property in the devisee, the executor has an interest in law, that will enable him to bring an action.

Then, how does this differ from the case (5), where the executor was himself the specific devisee, and the Bank was not held liable? Taking the rule of law to be, that the executor until assent can recover; the construction of the Will and the rule of law together is, that the executor has the right, until there is a person,

who

(5) *Hartga v. The Bank of England*, ante, Vol. III, 55.

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who can claim as the specific devisee. Great embarrassment would follow from the contrary decision. The Bank must be implicated in all those questions, which have been much agitated, but not with great satisfaction, what are, and what are not, specific bequests of stock. That is a difficult question upon this Will. Next, it is clear, that the executor may deal for the purposes of the Will with property, specifically devised; taking care in the ultimate arrangement, that the specific legatee, disappointed by a creditor, calling for payment shall be reimbursed; if finally contribution should not be necessary. If this Will does not actually pass to the devisee of the stock the interest, and it is to be governed by the same principles as other specific bequests, in every case of the administration of assets, the executor must of necessity be precluded from calling for a transfer, in order to pay debts; and, as it purports to be specific, and this entry is made in the Bank books, in every such case, where stock forms part of the residue, it would be impossible, that the executor could move, until a suit had been instituted by the Bank. The consequence must be, that they are in some way or other to come here; and say, that, as part of the property is in the funds, there must be a suit in equity for a general distribution of the assets, before they can part with any thing; though for the purpose of paying debts by bond or judgment. It is very difficult to maintain that.

Another difficulty occurs. If a testator leaves much general estate, and much, that is specifically bequeathed, some part to the executor himself, who has the means of applying the general assets, and there is a deficit to pay one-half of the debts, the executor must pay in respect of his own specific legacy; and may call upon the other specific legatees for a contribution: but can the Bank say, all the other specific legatees may arrange the question

question of contribution among themselves, but the Bank cannot tell, whether the Stock should contribute, without a general account of the assets; in order to ascertain, what is the general amount, the value of the other specific bequests; and what will be the residue of this specific devise of Stock? Consider the extent of difficulty, embarrassment, and expence, to which this doctrine must lead.

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If then executors can maintain an action against the Bank, I cannot conceive any Equity for the Bank, bound to pay by that action, or bound by their liability to be accountable, more than for any other person. The executor cannot maintain an action, if the Acts of Parliament vest the Stock in another legatee; or, if the executor has given his assent: but, if he cannot upon those grounds, he can upon no other but that he is permitted to receive that property, as being the trustee, not only for the debts, but to pay over to this specific devisee that property, made the subject of this specific disposition.

If none of these cases had been decided, I should have the same opinion I now express with regard to the case of Stock, part of a general residue. If the testator had it at the date of the Will, and the Will was attested by two witnesses, the Stock must pass under this clause as effectually, as if it was given *eo nomine*; or, as leasehold estate, or any other property would belong to the devisee or residuary legatee.

I feel considerable doubt upon the point, whether this is a specific legacy. Upon the two first of these instruments it is so in this sense, that it is a bequest of part of the stock he had: whether this is all the Stock he had, or whether there is other Stock, does not appear from so much

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much of the Will as I have seen (6); but from the phrase in the last codicil I suspect, that the testator had other Stock. Taking it so, the Will and the first Codicil mean, that the executrix was to be the trustee for the purpose of transferring, making sale, and remitting the money. Then the second Codicil, revoking the disposition, made by the former Will and Codicil, directs his wife to set apart and appropriate the sum of 1000*l.* Stock. That Stock has been either set apart and appropriated, or not: if not, it is part of the general assets: if it has been set apart and appropriated, that is an assent of the executrix; and, if there was enjoyment by the widow, after it was set apart and appropriated, upon an action by the executors, the proof, that it was set apart and appropriated, would be an assent, divesting the right of the executors, and would be an answer to their demand. If that is not so, the question is, whether there is any thing, making it specific, without that appropriation: so as to defeat the action of the executors. There is nothing, that can have that effect, except that the devise operates without their assent; or that the assent was given: and in either way, taking the rule to be furnished by the practical construction upon the Act, these specific devises of Stock belong to the executor, to be applied as the other property.

In this view of the case I do not consider some allegations, which are, I suppose, introduced with the view of raising the question upon the specific devise, as unconnected with the general state of the testator's affairs; as, that all the debts are paid; which, I suppose, the Bank do not mean to admit, except for the purpose of raising the question.

Sir

(6) It was admitted at the Bar that there was more Stock, to the amount of 2300*l.*

Sir *Arthur Piggott* observed, that the 1000*l.* Stock remained in the name of the testator : the other Stock, which was represented at the Bar as amounting to 2300*l.*, did not; and asked, how the former could be set apart more than by letting it stand in the testator's name.

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The Lord CHANCELLOR admitted that ; and said, he should consider the severance of the other Stock from the 1000*l.*, and her enjoyment in that mode, as her assent to the legacy. His Lordship added, that the Bank could never be held trustees. The effect would be most mischievous both to the public and the Bank; as they must be trustees with all the consequences ; unless by the particular mode, in which they are constituted, they have different obligations. They must, if they are trustees, take upon themselves to prove, that these persons were alive. That never could be the intention.

The Demurrer was allowed ; and the *Lord Chancellor* a few days afterwards said, he had read all the cases ; and stated the short ground, upon which he determined the case, thus : if the executor cannot maintain an action at Law, the Plaintiffs do not want the protection of this Court : if he can maintain an action, then the true construction of the Act of Parliament authorizes, or does not prevent that action ; and, if so, there is no Equity.

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Feb. 22d.

SUTTON v. JONES.
JONES v. SUTTON.

General rule,
that a Trustee
shall not be
the Receiver
with emolu-
ment.

BY the Will of Sir *Richard Sutton*, Bart. the reversion in several estates, consisting of houses in *London*, expectant upon the decease of Lady *Bath*, without issue, were devised to Sir *Charles Edmonstone*, Bart. and Mr. *Boodle*, and their heirs; to the use of the devisor's second son *John* for life; with remainder to the same trustees to preserve contingent remainders: remainder to the first and other sons of *John Sutton* in tail; with similar remainders in strict settlement to the devisor's other sons *Richard* and *Nassau*, and their respective issue.

A power was given to the tenants for life, respectively, and to the trustees, Sir *Charles Edmonstone* and Mr. *Boodle*, during their minorities, to demise or lease all or any part of the premises, if for the purpose of pulling down, and erecting new buildings, for a term, not exceeding 99 years; if for repairing or considerably improving, for a term, not exceeding 63 years: if for other reasonable purposes, not exceeding 21 years.—Power was also given to the trustees to sell and exchange with consent of the respective tenants for life, when in the actual possession.

John Sutton died in the life of the devisor without issue.

An objection was taken before the Master to a proposal of Mr. *Boodle*, as the Receiver, 1st, as being a trustee: 2dly, as being actually and substantially the
Solicitor

Solicitor for the parties interested in the estate: the ostensible Solicitor acting under his controul. The Master rejecting the proposal of Mr. *Boodle*, a petition was presented on behalf of the infant Plaintiff, Sir *Richard Sutton*, and several other parties; alleging, that Mr. *Boodle* is not the Solicitor for any of the parties: but the Master upon the other objection, that he was a trustee, and party in the cause, rejected him, without any regard to his fitness in other respects; that it is for the benefit of the infant Plaintiff, Sir *Richard Sutton*, and the other parties, that Mr. *Boodle* should be the Receiver; and being only a Trustee to preserve contingent remainders, with powers of leasing, and to sell and exchange, which latter power cannot be exercised during minority, the petitioners are not precluded from proposing him.

The petition accordingly prayed, that the petitioners may be at liberty to propose, and the Master to appoint, Mr. *Boodle*, Receiver.

Mr. *Richards* and Mr. *Daniell*, in support of the petition, admitting, that the objection would prevail against a trustee to manage, set, and let, who would be bound to perform without compensation those duties, contended, that it could not affect a trustee of this description. The power, which he and the other trustee have under the Will, of granting leases, for which he is to receive nothing, cannot interfere with the office of Receiver; in which character he is to manage the estate, having a compensation. A suit being instituted, leases cannot be granted under the powers without the approbation of this Court; who will take care, that they are properly granted.

Mr.

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Mr. *Alexander*, Sir *Samuel Romilly*, and Mr. *Leach*,  
 for the Parties opposing the Petition; and de-  
 siring an appointment of Mr. *Cockerell* forthwith.

The general rule is established, that a trustee can be appointed Receiver only, where no other can be found. In *Sykes v. Hastings* (7) it is stated, that the appointment of a Trustee to be Receiver is extremely rare; and only, where he will act without emolument; and there is no instance of such an appointment with emolument; unless no one else can be procured, who will act with the same benefit for the estate. The general rule stands upon two grounds: 1st. That a trustee shall not in any way receive emolument for performing a duty, which he is bound in his character of trustee to discharge gratuitously: 2dly. That it is his duty to superintend the Receiver. The other person proposed is admitted to be peculiarly qualified as Receiver and Manager of this estate; which consists of houses; being an eminent surveyor; in which capacity he has acted upon this estate many years.

*The Lord* CHANCELLOR.

It is impossible to grant the application for the appointment forthwith of Mr. *Cockerell*, as Receiver: the Master not having had the opportunity of judging upon a fair competition for this office between Mr. *Cockerell* and any other person. I am further influenced by the recollection of a case, where Lord *Thurlow* was much struck with the observation of Mr. *Graves* upon the importance of not interfering with the Master's judgment: and observation deserving the more attention, as receiverships were, I believe, at that time treated as a subject of patronage of the office: a practice, which I know does  
 not

(7) Ante, Vol. XI, 363. See III, 515, and the note, 516.

not prevail now. Another reason is, that in discussing the question many considerations may be laid before the Master with convenience and effect, and without mischief, which cannot have place here.

There is no doubt, that all those parties are highly respectable; and the Court has great satisfaction in applying the principle, where it does not involve the name of any person of a different description. The true object is to secure to the infants the skill of both these gentlemen, or of Mr. *Cockerell*, and some other person, to be proposed in competition with him to the Master. The general rule is admitted; standing upon general principles, adopted by the Court for very wise reasons; to which the Court does no justice by disappointing their application upon small distinctions; when the duties, to be performed, whatever description may be used by the testator, are substantially the same. The true question is, whether Mr. *Boodle* stands by this Will, invested with the power, and charged with the duty, of acting as a trustee. The circumstance, that he is a trustee to preserve contingent remainders, is nothing; neither is there any objection from the power to sell and exchange; which cannot at present be called into existence. That objection is now given up.

The real question at present turns upon the effect of this power of leasing. Looking at the Will, the particular nature of this estate, covered with buildings, and the circumstance, that the management is entrusted by the testator to both Mr. *Boodle*, and Sir *Charles Edmonstone*, equally, while both are living, they have in them now an authority to exercise the power of leasing, overriding the estate of inheritance in the infant: a power, coupled with a trust; as it is to be exercised for the benefit of the infant. The suit is instituted, I presume,  
for

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for the general management of the estate, to secure the interest of the infants; and one of the principal duties of the Court is to take care, that the most shall be made of the estate during the minority, with a view to the interest of the inheritance, not the immediate income. Where no such power of leasing is given, great inconvenience arises; as the Court cannot let beyond the minority. The trustees, if they will exercise this power, must act precisely as if the estate was given to them in trust to let. Then the Court must act upon general principles; and, if the reasoning is, that a trustee to manage and receive shall receive without gratuity, and if the Court is to pay a Receiver, the *cestui que trust* shall have the benefit of his knowledge, and of the superintendence of the trustee, as a check, can it be denied, that there is a most material distinction between these trustees, able to state reasons for refusing to execute a lease, and a trustee, standing in a situation, where he is exposed to the temptation of immediate increase of emolument by an immediate increase of rent? The infant, if he is to pay a Receiver, is entitled to have his judgment checked by the persons, executing the power; which is to be executed as coupled with a trust.

This case is therefore brought directly within the general principle; according to which Mr. *Boodle* acts as a trustee; with the character and duties of a trustee substantially imposed upon him; and directly connected with the management of the estate; the management of which depends principally upon the execution of this very power. It must therefore be referred back to the Master with liberty to propose any other person.

BIRD v. LE FEVRE.

ROLLS.

1809.

March 6th.

**E**LIAS BIRD, by his Will, dated the 8th of *July*, 1767, after declaring, that the several sums, which he had agreed to pay on the marriage of his daughter *Elizabeth*, should be vested in government securities, in discharge of his bond and other securities, and for exoneration of all the rest and residue of his estate whatsoever, and after several legacies, among others to his trustees and executors, gave to his said daughter *Elizabeth Panton*, an annuity of 200*l.* for life, over and besides what was provided for her by her marriage settlement, for her separate use, &c. and he gave to his trustees all his reversionary or contingent interest in the sum of 20,000*l.*, provided by the marriage settlement of his said daughter for her children, in trust to pay the said sum to such person or persons, and in such manner, &c. as she should by Will appoint; so as such appointment be not made in the life-time of her husband *Thomas Panton*; and in case she should survive her said husband, and should have no children or child, who should be entitled by the said settlement to the said 20,000*l.*, or any part thereof, he bequeathed all his interest in the said 20,000*l.*, and the said annuity of 200*l.*, given to his daughter for her life, upon the contingency of her surviving her said husband, and not otherwise, unto his daughter for her own use and benefit; and, after farther pecuniary legacies to his said trustees and others, he gave, devised, and bequeathed, all the rest and residue of his estates, both real and personal, to his trustees *William Currie*, *George Crosby*, and *Isaac Le Fevre*, their heirs, executors, administrators, and assigns; upon trust, that they should receive all his rents, issues, and

Construction of a residuary clause, as comprehending a legacy, given upon a contingency, which did not happen.

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and profits, of the said rest and residue of his estates, and all other his estate not therein and thereby before disposed of; and from time to time lay out and invest his said rents, &c. as the same should be received, in *South Sea Stock*, and also invest the dividends, as received, in the same stock, to accumulate for the term of twenty-one years from his death; and at the expiration of the said term of twenty-one years, and not sooner or otherwise, the said trustees should sell, dispose of, and convey, all the rest and residue of his estate both real and personal, and the stocks, so directed to be purchased, and apply the money, arising by such sales, and also all monies, which should not be vested in the said stocks, first in discharging the expences of the trust; and in the next place to invest 6500*l.* in some government securities, for the use and benefit of his said daughter, or such person or persons as should be entitled to the said 200*l.* annuity, by his said Will given, to and for the benefit of his said daughter, in lieu and full satisfaction of the said annuity of 200*l.*: but he declared his Will, that the said sum of 6500*l.* to be invested, was not to be enjoyed by or paid to his said daughter, or any other person or persons whatsoever, otherwise than upon the condition declared concerning the said sum of 20,000*l.*, and the said annuity of 200*l.*; and lastly, that the said trustees should pay and divide the residue of the said trust money to and amongst such persons and legatees, as after mentioned: that is to say, his mind and will farther was, that his trustees should get in the money due on the security of estates in *Ireland*, and invest the same, after deducting the expences, in *South Sea Stock*; and after the expiration of the said twenty-one years, commencing from his decease, and after all the several sums of money should be collected together, and all expences and deductions should be made, as in his said Will mentioned, so as to get at the net and clear sum, which should remain to be disposed of, then his will

will was, that his said trustees should divide and put the whole net sum so remaining into twelve equal parts or shares, and to be disposed of and paid as therein mentioned. The testator then gave to his daughter *Elizabeth Panton*, four shares for life; and after her decease to go according to her appointment by Will, after the death of her husband; and, in default of a Will, among her children; and disposed of the other eight shares among the children of his nephew, *Henry Bird*, and other persons. The testator directed his trustees not to sell his leaseholds, which he held for a long term of years, unless it was absolutely necessary, but to apply the rents thereof as the other parts of his residuary estate; and appointed *Curry*, *Crosby*, and *Le Fevre*, his executors.

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Upon the 14th of *August*, 1788, at the expiration of twenty-one years from the death of the testator, the trustees invested 6500*l.*, in the 3 *per cent.* Consolidated Bank Annuities.

In a suit, instituted in 1776, during the life of *Elizabeth Panton*, the necessary accounts and inquiries were directed; and the whole of the testator's residuary estate, except the said sum of 20,000*l.* and 8666*l.* 13*s.* 4*d.* 3 *per cent.* Consolidated Bank Annuities, purchased by the said sum of 6500*l.*, was distributed among the parties entitled. The former sum was soon after the testator's death paid to the trustees in the marriage settlement of *Thomas* and *Elizabeth Panton*; and invested in 3 *per cent.* Consolidated Bank Annuities; which were after the death of *Elizabeth Panton* transferred to *Le Fevre*, as the surviving executor of the testator. *Elizabeth Panton* died on the 2d of *June*, 1805, not having had any issue; leaving *Thomas Panton* surviving her; and having made her Will in pursuance of powers, vested in



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in by her articles of agreement, dated the 1st of *January*, 1791, for dividing between her and her husband the share of the estate of the testator *Bird*, to which she might become entitled under his Will; which articles were confirmed by an Order of Court; and under an Order, made upon the Petition of the executor of Mrs. *Panton's* Will, 4663*l.* 13*s.* 11*d.* 3 *per cent.* Consolidated Bank Annuities, being five twelfth parts of the stock, purchased by the 20,000*l.*, was transferred to him: by another Order the same proportion of the fund was transferred to *Thomas Panton*; and under other Orders the remainder of the fund was distributed to the several parties entitled, as part of the residuary estate of *Bird*, the testator. *Elizabeth Panton* during her life received the dividends of the 8666*l.* 13*s.* 4*d.* Bank Annuities.

The bill in this cause was filed by the persons, claiming under the children of the testator's nephew *Henry Bird*; insisting, that the fund of 8666*l.* 13*s.* 4*d.* Bank Annuities fell into the residue of the testator *Bird's* estate; and became distributable in the same proportions, and among the same persons, as the 20,000*l.*; and praying accordingly.

The answer of the Defendant, the executor of *Elizabeth Panton*, submitted, that the sum of 6500*l.* was given by the testator, *Elias Bird*, as part of the general residue of his personal estate; and, the absolute bequest thereof having failed upon the death of *Elizabeth Panton* in the life of her husband, the Bank Annuities, produced by that sum, as part of the residue bequeathed, became undisposed of by the Will, as if it had become a lapsed legacy by the death of the legatee in the life of the testator; and therefore belonged to the next of kin of the testator; and had not fallen into, and
 again

again become part of, the general residue, and as such divisible among the residuary legatees; but belongs to the estate of *Elizabeth Panton*, as sole next of kin; and is subject to her agreement with her husband; under which one moiety was claimed by her executor; and the other by *Thomas Panton*; and upon his death, after the suit had been instituted, by his personal representatives.

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Sir *Samuel Romilly* and Mr. *Heald*, for the Plaintiffs: Mr. *Richards*, Mr. *Hart*, and Mr. *Wingfield*, for Defendants: claiming, under the general residuary disposition, contended, that the sum of 6500*l.*, as a general legacy, taken out of the residue, the event, upon which it was bequeathed, not having happened, must fall into, and again become part of the residue; which will comprehend all, that by any casualty is undisposed of.

Mr. *Alexander* and Mr. *Joseph Martin*, for the executor of *Elizabeth Panton*: Mr. *Hollist*, and Mr. *Mitford*, for the personal representative of *Thomas Panton*: argued, that, where a residue is bequeathed to several persons, as tenants in common, and the disposition fails as to one, that share shall not go to the others; but is undisposed of; and this is the case of lapse of part of a residue, constituted in very clear and specific terms; which part is therefore undisposed of: the subject of the residuary disposition being distinctly marked: for instance, by the expression "the residue of the said trust money."

The MASTER of the ROLLS.

This is, not an absolute, but a contingent, bequest. There is one case, in which the sum of 6500*l.* is to be taken out of the residue: another, in which it is not. The purpose, for which it is to be taken out of the resi-

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 ~~~~~  
 BIRD  
 v.  
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due, is only, that it may be paid to the daughter, upon the same contingency, on which she is to receive the 20,000*l.*; which is expressly not to be paid, if that contingency does not happen. When he speaks of the second residue, he must mean, as it shall happen to be constituted; including the 6500*l.*, if the contingency fails; excluding it, if the contingency happens. It is erroneous to suppose, that it must mean such residue as shall be left, after taking out of it the 6500*l.*; when immediately before he had spoken of a case, in which that sum may be payable, and therefore may never be taken out of the residue. In the event, that has happened, it is clearly residue.

FLEETWOOD v. GREEN.

1809.  
*March 16th.*  
 Specific performance decreed against a purchaser, without a reference as to the title; upon possession, and no objection made to the abstract.

BY articles of agreement, dated the 25th of *March*, 1803, the Plaintiff in consideration of 10*s.* and the farther sum of 525*l.*, agreed to convey to the Defendant and his heirs, certain premises in the city of *Winchester*; and the Defendant agreed, that he, and his executors, &c. would accept the conveyance at his own expense; and it was agreed, that the purchaser should be let into immediate possession; and should from the day of the date thereof pay interest for the said sum of 525*l.*, until the 25th of *March*, 1804; "on which day the purchase-money is agreed to be paid;" and the Defendant agreed, that he, his heirs, executors, &c. would on the said 25th of *March*, 1804, on having a good title made to him, and on the execution of the conveyance, pay to the Plaintiff, his heirs, executors, &c.

the

the said sum of 525*l.*, with interest in the mean time, as aforesaid.

1809.

FLEETWOOD

GREEN.

The Defendant was let into possession immediately on execution of the articles; and continued in possession; and soon afterwards an abstract was delivered to, and remained in the possession of, the Defendant; who made no objection to the title. After the 25th of *March*, 1804, the Plaintiff made fruitless attempts to procure the Defendant to complete the contract; and in *August*, 1807, filed the Bill; praying a specific performance.

The Defendant by his answer admitted these facts; and that he had paid only sums, amounting in the whole to 48*l.*; which was not sufficient to satisfy the interest; that he was still in possession; and in several instances treated the premises as his own; and submitted to complete the contract upon having a good title.

Mr. *Leach* and Mr. *Newland*, for the Plaintiff, prayed a decree for a specific performance of the contract; and an account of the sums paid by the Defendant, and what was remaining due to the Plaintiff for principal and interest; and that the costs of the suit shall be paid by the Defendant.

Mr. *Bent*, for the Defendant, prayed the usual reference upon the title.

The Decree was made, as prayed by the Plaintiff; and the reference as to the title was refused (8).

(8) *Ante*, Vol. XII, 27. *roughs v. Oakley*, 3 *Swans.*  
*Margravine of Anspach v.* 159.  
*Noël*, 1 *Madd.* 310. *Bur-*

## ROLLS.

1809.

March 18th,  
21st, 23d, 25th.

Bond of a *feme covert*, as a Surety, enforced against her separate estate, under a settlement to her separate use, with Power of Appointment by Will, or any writing, purporting to be her Will, and in case she should die in the life of her husband, and without making any Will or other disposition, as to the whole or any part, then as to the whole or such part as to which no gift or disposition should be so made, to the persons, who would be entitled by the Statute, if she had died intestate and unmarried.

## HEATLEY v. THOMAS.

BY indentures of settlement, dated the 10th of June, 1788, previous to the marriage of *William Johnson* and *Sarah Smith*, widow, reciting, that *Sarah Smith* was under the Will of her former husband entitled to a legacy of 2000*l.*, which would become payable on the 4th of *March* next, by *John Willes*, as executor, and that she was likewise entitled under the said Will to an annuity of 150*l.*, to be paid half-yearly during her life, and that it was agreed, that the said 2000*l.* and the said annuity should be assigned, settled, and assured, to and for the sole and separate use and benefit of the said *Sarah Johnson*, as therein mentioned, it was witnessed, that the said *Sarah Johnson*, then *Smith*, by and with the consent of *William Johnson*, for the considerations therein mentioned, did bargain, sell, assign, &c. unto *John Willes* and *James Willes*, and the survivor, his executors, &c. the said legacy and annuity, and all arrears, future payments, &c. and all her estate, right, title, interest, property, claim and demand, whatsoever, of, in, to or out of, the same, every or any part thereof; to have and to hold to them, &c. but upon trust nevertheless, and to and for the sole and separate use and benefit of the said *Sarah Johnson*, then *Sarah Smith*, during the coverture between her and the said *William Johnson*, her then intended husband; and farther reciting, that the said legacy did not carry interest, and would not become payable until the 4th of *March*, 1789, and that it had been agreed, that the principal should remain in the hands of *John Willes*, at interest at 5 per cent. it was declared, that

that the interest should be paid half-yearly during the intended coverture to the proper hands of *Sarah Johnson*, and for her own sole use and benefit; and it was farther declared, and agreed, that it should be lawful to and for the said *Sarah Johnson*, at any time during her said intended coverture, by her last Will and Testament in writing, or any writing purporting to be her last Will, to be signed by her, and attested by two or more witnesses, to give or dispose of the said sum of 2000*l.* and the interest thereof, to such person or persons, and in such shares or proportions, manner and form, as she should think fit; and in case the said *Sarah Johnson* should happen to die in the life-time of the said *William Johnson*, her intended husband, and without making any Will or other disposition, either of the whole of the said sum of 2000*l.* or any part thereof, that then as to the whole or such part thereof, as to which no gift or disposition should be so made by her as aforesaid, the same should immediately on her death in the life-time of her intended husband, go and be paid to and amongst such person and persons as according to the Statute for the distribution of intestates' estates would be then entitled thereto, in case she had died intestate and unmarried.

The indenture contained a covenant by *William Johnson*, with *John* and *James Willes*, that the said sum of 2000*l.* should remain in the hands of *John Willes*, or be laid out or invested in such other security or securities, from time to time, as *Sarah Johnson* should, during the intended coverture, by writing under her hand direct or approve: so as the same should be laid out, invested and secured, in the names of *John* and *James Willes*, or the survivor, his executors, &c. upon the trusts of the settlement; and that the interest, dividends, or produce, thereof, and also the said annuity of 150*l.* should from time to time, during the joint lives of *William* and  
*Sarah*

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 v.  
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 ~~~~~  
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Sarah Johnson, be paid to her own proper hands and use; and, when paid, be used, enjoyed, and applied, by her, without any interference, hindrance, molestation, or disturbance, whatsoever, of or by him the said *William Johnson*, his executors, or administrators; and farther, that, in case *Sarah Johnson* should happen to survive him, then and in such case, the said sum of 2000*l.* or the stock, or fund, or security, in which the same should be then laid out or invested, should be paid, transferred, or assigned to *Sarah Johnson*, her executors or administrators, together with the interest, dividends, or produce thereof, to and for her and their own proper use and benefit, without any lawful let, suit, hindrance, &c. whatsoever, of *William Johnson*, or any person claiming under him.

In the year 1802 *James Willes* borrowed from the Plaintiff, *Ann Heatley*, 700*l.* upon the security of the joint and several bonds of himself, *William Johnson*, and *Sarah Johnson*; which bond, dated the 18th of February, 1802, was executed by them accordingly; with condition, reciting, that *Johnson* and his wife, at the special instance and request of *James Willes*, consented to join in the bond, to be void on payment of the principal and interest in 1805, as therein mentioned; and *Sarah Johnson* gave a bond of indemnity to her husband.

In January, 1803, the legacy of 2000*l.* then in the hands of *John Willes*, was lent to *James Willes*, upon a mortgage of leasehold premises for the residue of a term of 61 years, commencing in 1792, and upon his bond, and warrant of attorney to confess judgment; reciting, that *John Willes* paid the money at the request of *Sarah Johnson*,

Sarah

Sarah Johnson, during the life of her husband, made her Will, according to her power; and thereby gave, bequeathed, directed, limited, and appointed, all her separate estate, property, and effects, over which she had any disposing power, as therein mentioned; and appointed *John Thomas* and *James Willes*, her executors. *William Johnson*, the husband, died on the 13th of March, 1803. *Sarah Johnson* died on the 22d of September following, a widow; not having revoked or altered her Will. During the life of her husband she had, in August, 1802, out of the savings of her separate property lent *James Willes* 500*l.* upon his bond, payable in 1805, with interest.

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v.
THOMAS.

Probate of the Will of *Mrs. Johnson* was granted to *Thomas*; limited to all her right, title, and interest, in the 2000*l.* and interest: the 500*l.* and interest, and also all such sum or sums as were or should appear to be due to her by *John Willes* for the unappropriated interest and savings of the 2000*l.* while in his hands, and the unapplied part of the annuity of 150*l.*

In November, 1804, a Commission of Bankruptcy issued against *James Willes*; under which the Plaintiff proved a debt of 519*l.* 6*s.* 6*d.* and received a dividend of 4*d.* in the pound.

The Bill was filed against *Thomas*, and against the executor of *William Johnson*, the assignees under the Commission, and *James Willes* and *John Willes*; praying a declaration, that the estates of *James Willes* and *William Johnson*, and the separate estate of *Sarah Johnson*, which she became absolutely entitled to, and for her sole and separate use and benefit, under the settlement were jointly and severally liable to pay the principal and interest, due by the bond to the Plaintiff; and that such the estates of *William* and *Sarah Johnson* are jointly and severally

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severally liable to satisfy so much as shall not be paid by the estate of *James Willes*; and praying, that the mortgaged premises may be sold; and the mortgage paid; and that the residue of the debt, due to the Plaintiff, beyond the dividends she may receive under the bankruptcy, may be decreed to her out of the estate of *William Johnson*, and the separate estate of *Sarah Johnson*.

Sir *Samuel Romilly* and Mr. *Wear*, for the Plaintiff, cited the case of *Standford v. Marshall* (9); observing, that the only distinction between the cases was, that there the security was given for the debt of the husband. In *Hulme v. Tennant* (10) Lord *Thurlow*'s difficulty was not upon such a case as this; whether the separate property of a married woman could, in the shape of assets, after her death be liable to her contract; but how it could be got at during life; upon which Lord *Eldon* also entertained doubt in *Nantes v. Corrock* (11).

March 21st. The MASTER of the ROLLS said, in this case a doubt had occurred to him, whether the bond could affect the separate property of Mrs. *Johnson*, according to the late decisions: particularly *Sockett v. Wray* (12); as by the settlement she appeared to have no power of appointing, except by Will.

The cause was directed to be spoken to again.

For the Plaintiff.
March 23d. The case of *Sockett v. Wray* does not bear upon this.
The

(9) 2 *Atk.* 68.

(10) 1 *Bro. C. C.* 16.

(11) *Ante*, Vol. IX, 182.

(12) 4 *Bro. C. C.* 483.

The question there was, whether during the life of a married woman the Court could apply her separate property according to her engagement; which could not be; unless the act she had done could be considered as an appointment; which was Lord *Thurlow's* difficulty in the case of *Hulme v. Tennant*, and Lord *Eldon's* in *Nantes v. Corrock*; as it could not be got at by a sequestration. This property could have been got at according to the settlement; by which Mrs. *Johnson* was intended to have the power of appointing both the principal and the interest by deed in her life, as well as by Will. Though it is not expressly stated, that is clearly an omission; and the intention was so; which is evident from the words, that follow; that if she should die in the life of her husband, and without making any Will "or other disposition either of the whole of the said sum of 2000*l.*, "or any part thereof, that then as to the whole or such "part thereof, as to which no gift or disposition should "be so made by her as aforesaid, &c.;" and before that there is a clear disposition to her separate use: so as to make her a *fême sole*, according to the case of *Fettiplace v. Gorges* (13). Therefore, though in the former part of the settlement there is not an express power to dispose otherwise than by Will, yet the effect of the latter part, coupled with the former, is, that the property is settled to her separate use; and she might have disposed of the principal as well as the interest in her life. In *Sockett v. Wray* Lord *Alvanley* does not intimate; that property, clearly settled to the separate use of a married woman, would not after her death be applicable to her debts, contracted during coverture: the question in that case being, whether the property could be taken during her life.

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Mr.

(13) Ante, Vol. I, 46. 3 Bro. C. C. 8.

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Mr. Bell and Mr. Heald, for the Defendants.

The only interest, which Mr. *Johnson* had in this subject, as separate property, was for her life; with a power to dispose by Will. From the subsequent words, "or other disposition," a power to dispose by deed of what the *Lord Chancellor*, in *Jones v. Harris* (14), calls the *Corpus*, cannot be implied. Those words also are confined to the event of her death in the life of her husband. The question is, whether, having that interest for her separate use, with a power to dispose by Will only, she could dispose of it in any other way; as she has attempted, by entering into a bond; and, whether, when she survived her husband, this Court will appropriate to that bond this property. No case has gone to that extent. *Hulme v. Tennant*, and the others, have determined, that a married woman, with regard to property, which she has an absolute power to dispose of as a *feme sole*, shall be considered as a *feme sole* for the purpose of charging it with her debts; and the proposition cannot be carried farther either upon principle or authority. In *Jones v. Harris* (15) the *Lord Chancellor* held, that a married woman could be liable only according to the form of her contract; going expressly upon the ground, that there was nothing to affect the *Corpus*. So Mrs. *Johnson* could not charge the bulk of this property otherwise than by Will. This bond could not at any time be considered a valid charge upon her property. If her bond could during the coverture have the same effect as an appointment, by creating a valid charge, all the caution, used to restrain her appointment by deed, would have been fruitless. Can her death give effect to a bond, which would not have had effect in her life? If she had been restrained from appointing to a particular person, could she have given a bond to that person for payment of his debt? This property could not go to

(14) Ante, Vol. IX, 486.

(15) Ante, Vol. IX, 486.

to her husband except by her Will: otherwise it was to go to her next of kin; which excludes the husband (16). No action would have lain upon this bond; and in *Whistler v. Newman* (17) Lord *Rosslyn* says, this Court will not make the situation of the creditor better; and improve a security, which the law will not acknowledge.

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Sir *Samuel Romilly*, in Reply, said, the point in *Jones v. Harris* was as to affecting the property in her life. Even taking her to be a *feme sole* to all intents and purposes, how can the Court take the property in her life? There are no means of doing it; for this is property, that cannot be taken by sequestration.

The MASTER of the ROLLS in the course of the argument said, the question was, whether this was separate property to all intents and purposes. In *Sockett v. Wray* Lord *Alvanley* did not consider a married woman, who had only a power of appointment by Will, as having separate property; distinguishing that case from *Norton v. Turville* (18); where the creditor was allowed to resort to the separate property after the death of the wife; as she had a power of appointing either by Deed or Will. Upon the question in *Sockett v. Wray*, whether the wife could give the property to her husband, Lord *Alvanley* held, that she could not; that she could not affect it in any way but by a revocable instrument; and the bond was an instrument not revocable.

If this was absolutely separate property in Mrs. *Johnson*, upon the Plaintiff's construction of the deed, that takes it out of the case of *Sockett v. Wray*; and brings it to

(16) *Watt v. Watt*, ante, Vol. III, 244.

(17) Ante, Vol. IV, 129.

(18) 2 *P. Will.* 144.

1869.
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 v.
 THOMAS.

to that of *Hulme v. Tennant*; upon which the present Lord Chancellor has expressed some doubt; calling it a prodigiously strong case (19); and upon another occasion intimating, that, whenever the point shall distinctly occur, those cases would require full consideration (20). I must look with some attention at this settlement. Much will depend upon its particular expressions.

March 25th.

By the Decree an account was directed of what remains due to the Plaintiff for principal and interest upon the bond; and her costs were directed to be taxed. It was declared, that the estates of the Defendant *James Willes* and of *William Johnson*, and the separate estate of *Sarah Johnson*, were jointly and severally liable to pay the principal and interest of the Plaintiff's bond; and that the separate estate of *Sarah Johnson* is now liable to pay so much of what shall be reported due to the Plaintiff, as shall not be recovered from the estate of *James Willes*: (the said *Sarah Johnson* having given a bond to *William Johnson*, her late husband, to indemnify him against the Plaintiff's demand); and it was ordered, that the same be answered out of her assets; an account whereof was directed. An account was also directed of the separate estate of *Sarah Johnson* against her executors *John Thomas* and *James Willes*, and the assignees of the latter; and an account of her other debts; and a sale and application of the mortgage.

(19) Ante, Vol. IX, 188, *Jones v. Harris*. See the *Nantes v. Corrock*. note, V, 17.

(20) Ante, Vol. IX, 497,

ALLARD v. JONES.

1809.

April 12th.

UPON a Motion for an Injunction against cutting ornamental timber and young trees, not fit to be cut: the Defendant having the day before the Motion was made, entered an appearance, the fact, that he had appeared, was suggested as an objection by a gentleman at the Bar, (*Amicus Curiae*.)

Injunction
against Waste
not prevented
by Appearance
the day before
the motion.

Sir *Samuel Romilly* and Mr. *Heald*, in support of the Motion, contended, that the appearance could not prevent the Motion for an Injunction against waste.

The Lord CHANCELLOR granted the Injunction; observing, that, if a person, about to commit waste, and against whom a bill was filed, could by appearing the evening before the Motion prevent it, he would get two days for cutting the timber: perhaps it might be different, where he had appeared long enough to have enabled the Plaintiff to give notice.

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Ante, Vol. XIII, 59.

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(*) Altered by Stat. 6 Geo. IV. c. 16. s. 16.

(†) See page 288, note (9).

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(*) See note (19), page 338.

(†) See the notes, pages 462, 474. Statute 6 Geo. IV, c. 16, s. 8.

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28. Assignee in bankruptcy removed, and charged with interest at 5*l.* per cent. (before Statute 49 Geo. III, c. 121, s. 4.) for money paid in at his banker's to his account, and used as his own property. *Ex parte Townshend.* 470
29. Proof in bankruptcy under a security for more than the debt expunged: but security or satisfaction taken after a docket struck, not followed by a Commission, though it cannot be retained, and may amount to a contempt, was not within the Statute 5 Geo. II, c. 30, s. 24. The original debt therefore not forfeited (*). *Ex parte Browne.* 472
30. A debt which could not be recovered in an action against a plea of the Statute of Limitations, nor in equity by analogy to it, not admitted under a Commission of Bankruptcy. *Ex parte Dewdney.* 479
31. Though a bankrupt dies, not having surrendered, the Commission may proceed. 494
32. Act of bankruptcy by a man, who had retired from trade, but during the existence of a debt, contracted while in trade, will sustain a Commission. 495
33. Jurisdiction in bankruptcy legal and equitable. 496
34. Joint creditor may take out a separate Commission of Bankruptcy; and receive dividends. 499
35. Payment of dividend under a Commission of Bankruptcy against one

(*) See the references in note, page 474. Statute 6 Geo. IV, c. 16, s. 8.

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partner raises a new assumpsit by the other, depriving him of the benefit of the Statute of Limitations.

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36. Costs ordered to be paid, but not taxed until after the bankruptcy of the person to receive them, cannot be set off by the party, from whom they were due, proving a debt under the Commission. *Ex parte Thomas*. 539

37. Though a second Commission against a bankrupt, uncertificated under a former Commission is bad in Law, whether the Lord Chancellor will, at the instance of the bankrupt, supersede the latter, if the assignees under the former will not interfere with the property, *Quære*. Notice to them directed. *Ex parte Rhodes*. 539

See *Attorney or Solicitor and Client*,

4. *Lien*, 2. *Limitations* (Statute of), 4. *Partner*, 4, 11. *Scandal*, 1, 3. *Stock*, 2.

BARON AND FEME.

1. Probate of the Will of a married woman, which is now necessary, though formerly otherwise, limited to her power, by the assent of her husband, with respect to any beneficial interest; not, as to her right, as executrix of another person, to make an executor, and continue the representation. *Stevens v. Bagwell*. 139.
2. Demurrer by a married woman to a Bill, praying discovery only against her, and relief against her husband, as to contracts, &c. by her, as agent for her husband, alleging the vouchers, &c. to be in her possession; allowed: upon the objection, first, to making a mere agent a party: secondly, to admitting the testimony of a wife in her husband's cause. *Le Texier v. The Margravine of Anspach*. 159
3. Bond of a Feme Covert, as a surety enforced against her separate estate, under a settlement to her separate use, with power of appointment by Will, or any writing, purporting to be her Will, and in case she should die in the life of her husband, and

BARON AND FEME—continued.

without making any Will or other disposition, as to the whole or any part, then as to the whole or such part, as to which no gift or disposition should be so made, to the persons, who would be entitled by the Statute, if she had died intestate and unmarried. *Heatley v. Thomas*. Page 596

See *Interest*. *Representative*, 3.

BASTARD.—See *Interest*.

BILL OF COSTS.—See *Attorney*.

BILL OF EXCHANGE.—See *Issue*, 2.

BLOOD.—See *Proximity*.

BOND.—See *Profert*.

BOOKS.—See *Principal and Agent*, 2.

C.

CHAMPERTY.

Assignment to navy agents of part of the subject of a prize suit, then depending, void; amounting to champerty: viz. the unlawful maintenance of a suit in consideration of a bargain for part of the thing, or some profit out of it; which is not confined to Courts of Common Law. *Stevens v. Bagwell*. 139

CHANCELLOR.—See *Practice*, 1.

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CHARITY.

1. A Protestant dissenting chapel may be the subject of an information by the *Attorney-General* as a charitable institution. *The Attorney-General v. Fowler*. 85
2. Charitable bequest before the stat. 9 Geo. II, c. 36, to the congregation of Presbyterians, to which the testator belonged, for placing out apprentices two poor boys of such as were members of the said congregation, and living in the parish of *St. Martin in New Sarum*.
The fund, being considerably more than sufficient, the surplus was applied, upon the principle of *cy pres*, to place out sons of members of the congregation within that parish:

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2dly. Such boys in other parishes:
3dly, Daughters of members of the congregation, in the same manner:

4thly, Sons of Presbyterians generally; previously to building a school, or other purposes.

A proposal in favour of sons of persons, within the parish, of the established religion was rejected. *Attorney-General v. Wansay.*

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3. No general appointment of visitor, excluding a Commission of charitable uses under the Statute 43 *Eliz.* c. 4. from special powers, that would fall within the general visitatorial power; as powers to the Ordinary to interpret and determine doubts upon the Statutes; of amotion and punishment, and of appointment, to the Ordinary, and to the Dean and Chapter of *York*, in certain cases, &c. the whole visitatorial power, particularly as to the administration of the landed property, not being intended to be given to the Ordinary, as visitor.

Ex parte Kirkby Ravensworth Hospital. 305

4. Objection to the Decree under a Commission of charitable uses, as having issued in a case not warranted by the Statute 43 *Eliz.* c. 4. may be in the form of exceptions.

Ex parte Kirkby Ravensworth Hospital. 305

5. Authorities for extending the Act 43 *Eliz.* c. 4. to cases, where the governors or visitors are the trustees, or are abusing their powers; though an information would lie. 314

6. Power, clearly given, to interpret and determine doubts upon the Statutes, may itself constitute visitatorial power. 315

CHILD.

See *Interest. Maintenance. Power, 1. Trust, 1.*

CLIENT.—See *Attorney.*

COMMISSION.—See *Usury.*

COMMISSION OF CHARITABLE USES.

See *Charity, 3, 4.*

COMPOSITION.

1. Upon a composition a private agreement by some creditors for additional security, though for no greater sum, void. *Ex parte Sadler.* Page 52
2. Creditors bound by acting under a composition; as if they had signed. *Ex parte Sadler.* 52
3. Ground of holding any private agreement by parties to a composition for a greater payment, or better security, void: a fraud both upon the debtor and the other creditors. 55

CONDITION.

1. Legacy in trust to pay the interest to the separate use of *A.* for life; and, after her decease, as to the capital for her children: if no child, to pay the interest to her husband during his life; and from and after his decease, in case he shall become entitled to such interest, then to pay the principal to other persons.

Though the husband, having died during his wife's life, never became entitled to the interest, the limitation over was established: as distinguished from the case of express condition. *Pearsall v. Simpson.* 29

2. Bequest of residue, in trust, in case *A.* shall within six calendar months after the testator's decease give security not to marry *B.* then, and not otherwise, to pay to the children of *A.*; with a proviso to go over, if she shall refuse or neglect to give such security.

A condition precedent. The six months are exclusive of the day of the testator's death; therefore; as he died on the 12th of *January*, between eight and nine in the evening, a security given on the 12th of *July*, about nine in the evening, was held sufficient. *Lester v. Garland.* 248

CONFUSION OF PROPERTY.

Case by the old law of a wilful mixture by owner of corn or flour with that of another: the value being unequal, and therefore not to be distinguished, the other took the whole. 442

CONSIDERATION.

See *Bankrupt, 15. Principal and Surety, 1.*

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CONTINGENT LEGACY.

Construction of a residuary clause, as comprehending a legacy, given upon a contingency, which did not happen. *Bird v. Le Fevre.* Page 589

CONTRACT.

1. Parol evidence, in aid of a specific performance upon the sale of an estate by auction, to explain by declarations of the auctioneer an ambiguity on the face of the particular, by a general clause for a separate valuation of the timber, and also special provisions as to the timber upon certain lots, the agreement, signed on the back of the particular, binding the purchaser. Defendant, "to a strict fulfilment of this article, and to abide by the conditions and declarations made at the sale," rejected. *Higginson v. Clowes.* 516

2. Distinction, where evidence is to resist a specific performance. *Higginson v. Clowes.* 516

3. Though a Defendant to a Bill for specific performance of a contract, may have a decree for performance according to his construction, if adopted by the Court, without a Cross Bill, the decision being, not according to his construction, but only that he had contracted under a mistake, created by the Plaintiff, the Bill was merely dismissed. *Higginson v. Clowes.* 516

4. Specific performance decreed against a purchaser, without a reference as to the title; upon possession, and no objection made to the abstract. *Fleetwood v. Green.* 594

See *Pleading*, 3.

COPARCENER.—See *Joint Tenant.*

COPYHOLD.

1. Copyhold premises, purchased by the lord, tenant for life of the manor, with remainders over, taking the surrender to him and his heirs, merge; and, as parcel, are subject to the limitations, of the manor; and, though under a covenant by the purchaser to surrender them by way of mortgage to the mortgagee and his heirs he could compel a re-grant by the remainder-man, no re-grant having been made, the general devisees

COPYHOLD—continued.

of the purchaser have no equity. *St. Paul v. Viscount Dudley and Ward.* Page 167

2. Devise by the general terms, "all the rest, residue, and remainder of my real and personal estate of what nature or kind soever" to nephews and nieces, not being for creditors, wife or children, is not sufficient to raise a case of election, or for supplying the want of surrender of copyhold land, contiguous and intermixed with freehold, against the heir. *Judd v. Pratt.* 390

3. Devise of all freehold and copyhold estates.

The copyholds were surrendered to the use of the Will: but the testatrix afterwards exchanged part for other copyholds: which were not surrendered: the heir, claiming beneficially under the Will, was put to election. *Frank v. Lady Standish.* 301, 2.

4. The doctrine of election applied to copyhold estate, not surrendered to the use of the Will. 393

5. Distinction, as to supplying a surrender by implication from general words, between the cases of creditors and children: in the latter the intention is satisfied by freehold estate: the extent of the provision being indefinite; which in the other is measured by the amount of the debts. 394

6. Ante, Vol. XII, 426.

Upon Appeal the Lord Chancellor's opinion being, that the reversion of the copyhold estate passed under the general devise, "as to all such worldly estate and effects as it may please God to bless me with all, or I may leave, or I may be entitled to, at the time of my decease, whether real or personal, not before given or disposed of," especially if there was no freehold estate, inquiries were directed to ascertain that fact; and also, whether there was any custom of surrendering a vested interest in reversion or remainder, expectant upon an estate tail. *Church v. Mundy.* 396

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COPYHOLD—continued.

7. Copyholder's right of surrender to the use of his Will; though no instance upon the records of the manor: or, if no such custom, there must be some mode of disposition by deed; as in the case of customary freeholds; the want of which (in the case of creditors, &c.) will be supplied. Page 403

See *Election*, 1, 2. *Power*, 1.

CORPORATION.—See *Party*, 1, 2.

COSTS.

1. Security for costs by a Plaintiff gone abroad, refused, after answer, on affidavit of his intention to return; and his family remaining in this country. *White v. Greathead*. 2

2. Distinction, where costs are disposed of as a subject of relief: an Appeal not open to the objection upon an Appeal for costs only. *Taylor v. Popham*. 72

See *Attorney. Practice*, 3.

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See *Bankrupt. Composition. Merger*.

CY PRES.—See *Charity*, 2.

D.

DEBTOR.

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DEED.—See *Profert. Purchaser*.

DEMONSTRATIVE LEGACY.

See *Legacy*.

DEPOSITIONS.

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See *Evidence*, 4. *Practice*, 8, 9.

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EAST INDIES.—See *Receiver*, 2.

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See *Bankrupt*, 3. *Copyhold*, 2, 3, 4.

ERROR.

Writ of Error generally stays execution in civil cases: not in criminal. *Huguenin v. Baseley*. Page 180

ESTATE FOR LIFE.

See *Life-Interest. Merger. Power*.

ESTATE IN FEE.

See *Vendor and Vendee*, 2.

ESTATE TAIL.

1. Originally an estate tail was an estate upon condition; to become a fee upon issue had, for the purpose of alienation: but not absolutely; as, if not aliened, it descended *per formam Doni*. 137

2. No formedon for the issue in the life of tenant in tail. 137

3. Devise to A. and after his death to his first and other sons, and in default of male issue then unto his eldest and other daughter, and to their heirs male for ever. An estate in tail male in A. *Wight v. Leigh*. 604

See *Merger*.

ESTATE TAIL AFTER POSSIBILITY OF ISSUE EXTINCT.

See *Tenant in Tail after Possibility, &c. Waste*, 3.

EVIDENCE.

1. To support a Bill to perpetuate testimony the Plaintiff must have an interest: but the minuteness or remoteness of it is no objection. A mere contingency, however near and valuable, (with the exception of the case of a wager), the expectation of issue in tail, heir apparent, or next of kin of a lunatic, is not sufficient.

Therefore a demurrer to a Bill by tenant in tail in remainder and his issue to perpetuate testimony of the validity of his marriage allowed.

Whether a Bill could be maintained by the trustees to preserve contingent remainders, representing also the legal inheritance of the whole estate, *Quære. Allan v. Allan*. 130

2. Order, that depositions shall be read at the trial of an issue; if

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EVIDENCE—continued.

the witness shall be then dead; or proved to be in such a state of health as not to be capable of attending.

Without such Order, to make the depositions evidence at Law, the whole Record must be read. *Palmer v. Lord Aylesbury.* Page 176

3. Witnesses having been examined *de bene esse*, with the view to a trial at Law, the examination of another witness, is not permitted without strong circumstances; as, upon a second ejectment, brought after verdict for the Defendant, the examination of a witness, produced at the trial, who had not been examined under a Bill to perpetuate testimony, was permitted; not as to other witnesses. *Palmer v. Lord Aylesbury.* 290

4. Distinction as to an Answer to a Bill of Discovery, read as evidence at Law: the whole must be before the Jury. 362

5. Depositions before publication suppressed; being taken by the Commissioners ready prepared: the witness being agent in the cause; and the mode, in which the Court receives the information, whether from the Commissioners, or otherwise, is not material.

The Commission directed to proceed for the purpose only of re-examining that witness; substituting another Commissioner for one, who, having refused to qualify, was not permitted to be present at the examination. This Order not to prevent the Court's opening the depositions, if a case of necessity should arise; as, if the witness could not be again examined. *Shaw v. Lindsey.* 380

6. Depositions suppressed: the Commissioners having employed the Clerk of one of the parties as their Clerk. 380

7. Witness cannot give as his evidence answers in writing prepared before the examination: nor is any suggestion to him by the Attorney, Counsel, or any other person, during the examination, permitted; and

EVIDENCE—continued.

in Equity whenever such fact is disclosed, the deposition will be suppressed. Page 381

8. Depositions suppressed, and a re-examination directed; the deposition being taken from the witness, using during the examination full minutes in writing, which she stated to have been originally her own, put into method by the Attorney; and so copied with some corrections by herself. 382

9. Extrinsic evidence admitted, not to construe a Will, but to shew, with reference to what it was made. 514

10. Though a paper, as the particular upon a sale by auction, may by reference be engrafted into a contract within the Statute of Frauds, that will not authorise the introduction of parol evidence to shew what part was read. 522

See *Baron and Fême*, 2. *Contract*, 1, 2. *Practice*, 4. *Principal and Agent*, 2.

EXAMINATION DE BENE ESSE.

See *Evidence*, 3.

EXCEPTION.—See *Practice*, 10.

EXECUTOR.

1. Testator gave all his estate and effects to two persons, their heirs, executors, &c.: upon trust in the first place to pay, and charged and chargeable with, all his debts and funeral expences, and the legacies after given.

Those persons, whether they could claim in their individual characters, or not, being afterwards appointed executors, held entitled to the residue, undisposed of, (including a legacy to a Charity, void by the Stat. 9 Geo. II, c. 36) for their own benefit; against the claim of the next of kin: the whole property being personal. *Dawson v. Clark.* 409

2. Instances, where the residue being intended to be given from the executors, they cannot take it; though the bequest does not take effect. 414

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3. Executors take the residue, precisely in the same plight as residuary legatees would take it. *Page 417*
See Limitations (Statute of), 6.
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EXONERATION.

Portions, to be raised by a trust term in a marriage settlement: the real estate held the primary fund; and a covenant by the settlor to pay them auxiliary only: *Lechners v. Carleton.* 193

F.

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FRAUD.

In general cases, where a debt is cut down by the policy of the Law, the complaint may be by *Particeps Criminalis.* 469

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FRAUDS (STATUTE OF).

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FRIENDLY SOCIETY.

The preference, given to friendly societies by the Statute 33 Geo. III. c. 54, s. 10. over other creditors, is confined to debts in respect of money in the hands of their officers by virtue of their offices, and independent of contract: therefore does not extend to money, held by the treasurer upon the security of his promissory note, payable with interest upon demand. *Ex parte Stamford Friendly Society.* 280

G.

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H.

HEIR.

Heir, being also devisee, takes by purchase, not by descent; if the devised estate is not of the same nature. *Page 371*

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INSURABLE INTEREST.

Insurable Interest in a trustee in respect of the legal interest in a ship; as in the *cestui que trust* in respect of the equitable. 67

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Interest upon a legacy to a wife or a natural child not allowed from testator's death; as it is in favor of a legitimate child by way of maintenance. *Lowndes v. Lowndes.* 301

INTEREST FOR LIFE.

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INTERPLEADER.

Interpleader upon notice of a variety of claims by persons, among whom an entire charge upon an estate was split; though no suit instituted; and but one legal right of entry: the principle being, not merely that the payment cannot be safely made, but that the party, entitled to be discharged by a single payment, should not be harassed by a number of suits. *Angell v. Hadden.* 244

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JOINT AND SEPARATE COMMISSION.

See *Bankrupt*.

JOINT AND SEPARATE CREDITOR.

See *Bankrupt*.

JOINT-TENANT.

1. Devise and bequest of leasehold, freehold, and copyhold, estates to trustees, their heirs, executors, &c.; upon trust to sell; and pay debts, &c.; and after payment thereof to pay and apply the rents, &c. to A. for life; and after his decease devising and bequeathing to the heir or heirs at law of B. and the heirs, executors, &c. of such heir or heirs; to whom the trustees were directed to convey and assign accordingly.

Co-heiresses of B. being also the co-heiresses of the deviser, take, not as co-parceners, by descent, but as joint-tenants, by purchase; and therefore subject to survivorship. *Swaine v. Burton.* Page 365

2. Joint-tenancy under a bequest of personal property to more than one without words of severance. 371

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Distinction between a residuary devise and legatee as to lapse: the latter taking every thing, that lapses: the former not. 415

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LEGACY.

Legacy of "£5000 sterling or 50,000 "current rupees," afterwards described as "now vested in" the *East India Company's* bonds, and sometimes mentioned as "the said sum "of £5000 sterling" held not specific, but general; as a demonstrative legacy; with a fund pointed out:

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LENGTH OF TIME.—See *Limitations*.

LESSOR AND LESSEE.

1. Under an agreement for a lease the lessor is not without express stipulation entitled to a covenant, restraining alienation without licence; as a proper and usual covenant. *Church v. Brown.* 258
2. Power of assignment incident to the estate of a lessee, without the word "assigns," unless expressly restrained. 264
3. Execution of an agreement for a lease with proper covenants: viz. according to the general practice as to such leases; and not contradicting the incidents of the lessee's estate; one of which is the right to have it without restraint, except what is imposed by law; unless an express contract for more. 264
4. Covenant, restraining assignment of a lease, would not permit under-letting. 265
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6. Proper covenants implied in an agreement for a lease; as connected with the character and title of the lessor. 265
7. Covenant, that a lease shall determine upon the bankruptcy of the tenant. 268
8. Under an agreement for a lease "with usual covenants" the lessor is not entitled to a covenant against assigning or under-letting without licence. *Brown v. Raban.* 528

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2. Solicitor's lien in bankruptcy; as in a cause, upon the Debt and Costs: viz. the clear result of the equity between the parties.

Distinction between the practice of the Courts of Law: the *Common Pleas* upon the same principle not allowing the lien to interfere with a right of set-off, &c.: the *King's Bench* holding the lien paramount any claim of the party. *Ex parte Castle.* 539

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LIFE INTEREST.

Trust by Will as to the residue of real and personal estate for a nephew and his heirs, to pay him the interest for life, with power to the trustees, in case they should see it would be for his benefit to advance him, when it may be in their power, any part of the principal for his advancement in life, that they will not withhold such assistance as they may deem necessary: but, in case no part should be advanced, the residue to be divided among the nephew's issue; with a limitation over, if he should leave no issue.

The nephew is entitled, not to the absolute property, but for life only; and, no advancement having been made, an inquiry was directed, whether his circumstances required advancement. *Robinson v. Cleator.* 526

LIMITATION, CONDITIONAL.

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LIMITATIONS (STATUTE OF).

1. Plea of the Statute of Limitations to a Bill of Discovery over-ruled; upon letters, assigning reasons for declining to pay; and recommending the Plaintiff to bring an action; as amounting to an acknowledgment of the debt, sufficient to take it out of the Statute upon the authorities; though against principle. *Baillie v. Sibbald.* 185
2. As to reviving a debt, within the

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3. Effect of time in Equity by analogy to the Statute of Limitations. 496
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 6. Executor not bound to plead the Statute of Limitations; but after the Decree the Objection may be taken against other creditors, coming in before the Master. 496
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LUNACY.

Commission of Lunacy in a proper case granted upon the application of a stranger; and without regard to his motive: the Lunatic being a natural child; and his mother opposing it. *Ex parte Ogle.* 112

M.

MAINTENANCE.

1. The interest of small Legacies ordered to be paid to the mother, for maintenance, upon her Affidavit, that the father was abroad in very embarrassed circumstances. *Walker v. Shore.* 123
 2. A direction for maintenance, in general terms, comprehending all children, not restrained by the bequest of the capital, in terms limited, to those living at the date of the Will. *Freemantle v. Taylor.* 363
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If Tenant for Life, paying off an incumbrance, in that transaction merges the security by taking an assignment, connecting it with the legal estate of inheritance, upon that transaction *prima facie* there is no charge.

In the case of Tenant in tail, as he represents the inheritance, the presumption is, that, whether he takes an assignment, or not, the debt is gone; unless there is evidence of an intention to continue it a charge.

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MONEY.—See *Will*, 5.

MORTGAGE.—See *Priority*.

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NAME.

1. Devise to the devisor's sister A., then unmarried, for life; with remainders to her first and other sons in tail male; to her daughters in tail, as tenants in common; to his sister B., then married, for life, and to her first and other sons in tail: remainder to the first and nearest of his kindred being male and of his name and blood, that shall be living at the determination of the estates before devised, and to the heirs of his body.

A person, claiming under the last limitation, must be of the name, as well as the blood; and the qualification as to the name is not satisfied by having the name, taken by the King's licence, previous to the determination of the preceding estates. *Leigh v. Leigh*. 92

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3. The effect of the King's licence is only permission to use a name: not imposing it. 100

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Writ of *Ne exeat Regno*, upon a legal demand against an Attorney, on the ground of his privilege, by analogy to the case of equitable demands, refused. *Gardner v. ———*. Page 444

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See *Interest*. *Maintenance*. *Trust*, 1.

PAROL EVIDENCE.

See *Contract*, 1, 2. *Evidence*.

PARTICEPS CRIMINIS.

See *Fraud*.

PARTNER.

1. Bill by assignees of a bankrupt, claiming a debt, which had been paid to his partner, as paid after notice of dissolution of the partnership, that partner retiring, and the bankrupt continuing, dismissed: the terms of the alleged arrangement not being made out: so as to establish the right in equity of the bankrupt against the legal right of the other partner.

The other questions therefore were not determined:

1st, Whether a demand, the result of an over-payment in advance upon a single transaction of sale between merchants, or merchant and factor, was within the exception as to merchants' accounts in the Statute of Limitations:

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2dly, As to the effect of that exception; whether including merchants' accounts generally, or those only with items continuing within the six years.

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